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No. 01-1307

IN THE

Supreme Court of the United States

DIANNE FOSTER, MARK ALBRECHT, RICHARD DIGIACOMO, and BARRY LEE PARKS,

Petitioners,

v.

LORRAINE GARCY, in her official capacity as Superintendent, Board of Education, Livermore Valley Joint School District; KIM LOGAN, Superintendent, Ukiah Unified School District; JOE COTO, Superintendent, East Side Union High School District; RUTH MCKENNA, in her official capacity, Superintendent, Board of Education, New Haven Unified School District.

Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

I. Whether public employers can lawfully collect agency fees and forward them to unions in the absence of "the constitutional requirements for the . . . collection of agency fees," *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986)?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings in the court whose judgment is sought to be reviewed are named in the caption.

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No. 01-____

DIANNE FOSTER, MARK ALBRECHT, RICHARD DIGIACOMO, and BARRY LEE PARKS,

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v.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

Petitioners respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered, as amended, on November 5, 2001.

OPINIONS BELOW

The November 5, 2001 opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A [hereinafter "App."] at 1a) is reported at 268 F.3d 689. The opinion of the United States District Court for the Northern District of California (App. B at 10a), is not reported officially, although it is unofficially reported at 1999 WL 1788185 (N.D. Cal. Oct. 22, 1999).

JURISDICTION

The court of appeals initially entered judgment on October 15, 2001, and subsequently amended it on November 5, 2001. Petitioners timely filed a petition for rehearing *en banc*, which was denied by Order dated November 23, 2001 (App. C at 21a). The time for petitioning for writ of *certiorari* runs from the later date. This petition is timely filed under Supreme Court Rule 13.1. This Court's jurisdiction is invoked pursuant to 28 U.S.C.A. § 1254(1) (West 2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983 (West

Supp. 2000). Their pertinent texts are set forth in Appendices E at 29a, F at 30a, and G at 31a.

STATEMENT OF THE CASE

This is a civil rights action under 42 U.S.C. § 1983 alleging unconstitutional enforcement of union agency fee obligations contained in collective bargaining agreements. The sole question presented in this petition is whether a public employer must refrain from forced payroll withholding of agency fees where the union has not complied with the constitutional preconditions for agency fee collection set forth in this Court's decision in *Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986). The school district superintendents [hereinafter "school districts"] argued, and the court of appeals held, that a public employer has no legal duty to refrain from enforcing, through forced payroll withholding, an illegal agency fee requirement. Without that legal duty, a court cannot enjoin the employers from taking employees' money and paying it to the unions; even where, as here, the court has found the unions are not lawfully entitled to the fees.

I. The Facts

This civil rights suit was filed by eight nonunion public school teachers [hereinafter "teachers" or "Petitioners"], each employed by a different California school district and represented by a different local labor union affiliated with the California Teachers Association and the National Education Association.[1]

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[1] R. 1: Complaint for Declaratory, Monetary and Injunctive Relief [hereinafter "Complaint"], p. 2, ¶ 1; R. 17: Answer of

(continued...)

The school districts have entered into collective bargaining agreements [hereinafter "CBAs" or "labor agreements"] with the labor unions. The CBAs control the terms and conditions of Petitioners' employment.[2]

Each of the CBAs has an "organizational security" clause requiring teachers to subsidize the union either by (a) joining the union and paying dues or (b) paying an agency fee.[3] At all relevant times, Petitioners were not members of the unions. App. B at 12a, ¶ 2. The unions spend part of their revenue on collective bargaining-related activities and part on political and other activities not lawfully chargeable to objecting nonunion employees.[4]

Under some state labor statutes, as well as under the National Labor Relations Act, enforcement of an agency fee requirement is accomplished through termination of employment or the threat thereof. California law applicable to teachers and other public sector employees is different. California law permits

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[1](...continued)
Defendants Joyce C. Mahdesian, et al. [hereinafter "Employers' Answer"], pp. 1-2, ¶ 1; R. 18: First Amended Answer of Defendants Livermore Education Association, et al. [hereinafter "Unions' Answer"], pp. 1-3, ¶ 1.

[2] R. 1: Complaint, p. 8, ¶ 32; R. 17: Employers' Answer, p. 4, ¶ 32); R. 18: Unions' Answer, p. 3, ¶ 7.

[3] App. B at 12a, ¶ 2.

[4] *Id.*, ¶ 4.

school districts to seize agency fees from wages paid to teachers.[5] The CBA entered into by each of the school districts contains a contract provision whereby the union indemnifies the school district from all liability and attorney fees incurred in litigation over collection of the union's agency fees.[6]

The unions sent Petitioners notices explaining the calculation of the agency fees, purportedly pursuant to this Court's decision in *Hudson*. This Court held in *Hudson* that before nonunion employees can be forced to pay agency fees, they must be provided, *inter alia*: (a) notice of their right to object to and abstain from subsidizing union activities not lawfully chargeable to nonunion employees; (b) procedures by which those rights can be effected; and (c) financial disclosure, verified by an independent auditor, of the union's allocation of expenditures. 475 U.S. at 305-10. The unions' financial information included in the *Hudson* notice was not "verified by independent auditor." App. B at 13a, ¶ 7. Nevertheless, in accordance with the CBAs and as permitted under California law, the school districts commenced involuntary withholding of agency fees. At no time prior to the district court's ruling did the school districts discontinue the collection of agency fees from the teachers' wages.

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[5] *Id.*, ¶ 3.

[6] Relevant provisions of the CBAs are appended to R. 38: Declaration of Jeffrey B. Demain in Support of Superintendent Defendants' Motion for Summary Judgment, pp. 12, 20, 30, 40.

II. Proceedings Below

The teachers filed their Section 1983 complaint on December 5, 1997. They alleged a single cause of action–violation of the teachers' First and Fourteenth amendment rights by the school districts' seizure of agency fees in the absence of independently audited financial disclosure of union expenditures. The complaint named as defendants both the local labor unions and the school districts which seized the agency fees from the teachers' wages.

Upon completion of discovery, the teachers moved for summary judgment contending that seizure of the agency fees in the absence of independently verified financial disclosure of the unions' expenditures violated the teachers' constitutional rights. The school districts also moved for summary judgment, arguing that they owed no duty to abstain from forced collection of the unions' agency fees, even if the unions failed to comply with the constitutional requirements for the collection of agency fees. In addition, the unions cross-moved for summary judgment contending that the Constitution did not require them to provide nonunion employees with independently verified financial disclosure of the unions' expenditures. The school districts joined the unions' cross-motion. It was undisputed that nonunion employees in the respective bargaining units were never provided audited financial statements of the unions' expenditures.

On April 23, 1999, the district court announced its decision from the bench and requested the parties to jointly draft a final order. After denying a motion for reconsideration filed by some defendants, the district court entered its final order on October 22, 1999.

A. The District Court's Decision

The district court held that the unions and the school districts violated the teachers' constitutional rights by withholding agency fees where the constitutional preconditions to agency fee collection–in this case, audited financial disclosure–had not been observed. The district court specifically held that public employers were liable for unlawful agency fee withholding in the absence of *Hudson* compliance. The court reasoned:

> The [Ninth Circuit] in *Knight [v. Kenai Peninsula Borough School District*, 131 F.3d 807 (9th Cir. 1997),] held that the employer cannot take adverse action against nonmember employees without first ensuring that the nonmembers' constitutional rights were not violated. The *Knight* Court's citation to *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), reflects that Court's endorsement of the principle that an employer's deduction from wages constitutes sufficient adverse action to implicate the public employer's duty to assess the sufficiency of the union's *Hudson* notice. Therefore, the public employers in this case are liable because they failed to ensure that the plaintiffs' constitutional rights had been observed prior to commencing involuntary withholding of the agency fees.

App. B at 16a, ¶ 7.

The district court granted declaratory relief and enjoined both the unions and the school districts from enforcing, through involuntary collection, the agency fee requirement until *Hudson*'s

requirements were complied with.[7] The unions did not appeal from that decision. The school districts also did not appeal the district court's holding that *Hudson*'s financial disclosure requirements had not been met. The school districts did, however, reiterate their argument to the court of appeals that they owed the teachers no legal duty to abstain from forced collection from them of the unions' agency fees, even where the unions refused to comply with *Hudson*.[8]

B. The Court of Appeals' Decision

The Ninth Circuit Court of Appeals (Pregerson, J., sitting by designation) reversed the district court. The panel held that "action more serious than routine collection of agency fees is required before the [public employer's] duty [arising under the Constitution] is triggered." App. A at 9a. The court cited no precedent for this holding and proffered no rationale to support it, although the panel did attempt to distinguish the two contrary cases relied upon by the district court.

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[7] The district court also granted nominal damages against the unions but not the school districts. The litigants agreed that under Ninth Circuit precedent, the Eleventh Amendment protects the school districts from retrospective monetary relief. The claim against the school districts for monetary relief, therefore, was withdrawn.

[8] By the time the district court granted summary judgment, four of the eight original plaintiffs had obtained alternate employment and no longer had standing to pursue their claims for injunctive relief. Because only injunctive relief was sought against the school districts, the four corresponding school districts were dismissed as defendants. These four teachers continued to press their claim against only the unions.

This Court in *Hudson* held that "the *government and union* have a responsibility to provide procedures that minimize th[e] impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights." 475 U.S. at 307 n.20 (emphasis added). The panel attempted to distinguish this holding by stating that this language was employed by the *Hudson* Court only in the context of the neutral fact finding procedure required under *Hudson* for agency fee collection. The panel reasoned that this holding, therefore, did not apply to invalid *Hudson* notices and financial disclosure. App. A at 8a.

The panel also attempted to distinguish *Tierney v. City of Toledo*, 824 F.2d 1497, 1504 (6th Cir. 1987). The panel singled out *Tierney* for discussion because (1) an earlier Ninth Circuit decision, *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807, 817 (9th Cir. 1997), endorsed language from *Tierney* which found employer liability, and (2) the district court in this case had relied upon the *Knight* court's endorsement of this *Tierney* language. The panel conceded that *Tierney* supports employer liability. However, the panel limited *Tierney*'s holding to challenges to the existence of a constitutional "plan," not to situations where fee payers receive inadequate *Hudson* notices. App. A at 8a.

The panel's analysis was limited to a brief discussion as to why the foregoing two cases which impose employer liability were not controlling here. The panel did not discuss why a contrary rule (*i.e.*, employer immunity for illegal seizure of agency fees) would be the proper result in this case. The panel also did not address the other federal district courts' and federal courts of appeals' decisions which hold that employers are jointly liable for unlawful agency fee collection in violation of *Hudson*.

ARGUMENT

I. There Is a Conflict Among the Circuit Courts of Appeals.

Except for the decision of the panel in this case, the question whether employers are liable for withholding agency fees in the absence of the constitutional requirements for the collection of agency fees has always been answered in the affirmative. There is no other contrary precedent. The rule of law adopted by the Ninth Circuit in this case has been rejected by every court that has considered the issue, including three federal courts of appeals.

A. The Sixth Circuit

In *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), the Sixth Circuit held that

> A careful review of the requirements of *Hudson*, therefore, yields the conclusion that the following provisions are essential for any plan meeting the constitutionally minimum requirements. . . . [F]irst, [] no union or ***employer*** may take any action to enforce a non-union member's duty to pay any dues, whether through ***a deduction from wages*** or payment from wages already paid, until a plan with procedures meeting the commands of *Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977)] and *Hudson* is established and operating. Specifically, all non-members must receive an adequate accounting, certified by an independent auditor . . . .

Id. at 1504 (emphasis added). *Tierney* held that these are the "constitutionally minimum requirements" based on "a careful review of the requirements of *Hudson*." *Id.*

The panel below readily acknowledged that *Tierney* is in conflict with its decision. But the panel interpreted *Tierney* not to impose employer liability where the union put in place a *plan* comporting with *Hudson* but a nonunion employee nonetheless did not receive adequate notice (perhaps because the plaintiff was inadvertently excluded from the mailing list). App. A at 8a.[9]

Tierney cannot be so easily distinguished. *Tierney* requires not only that constitutionally adequate procedures be established, but also that these procedures be "operating." 824 F.2d at 1504; *see also id.* at 1507 ("further proceedings by the defendants aimed toward enforcing collection of a 'fair share' service fee from the dissenting non-union members must be stayed by appropriate injunctive relief until a constitutionally adequate plan . . . is *functioning*") (emphasis added). The problem in this case is not that the teachers did not receive an adequate *Hudson* notice sent to everyone else. Rather, the notice received by all nonmembers

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[9] The panel's interpretation of *Tierney* is fundamentally at war with its interpretation of *Hudson*. The panel distinguished *Hudson* on the ground that *Hudson* imposed obligations on the public employer only in connection with the neutral fact finding procedure, and not in connection with the other procedural safeguards (*e.g.*, the notice obligations). But even under the panel's cramped interpretation of *Tierney*, *Hudson* does, in fact, impose legal duties in connection with the *Hudson* notice, so long as the violations of that duty emanate from an inadequate "plan."

included financial information that was not audited, as *Hudson* requires. At no stage during this litigation has it ever been suggested that the unions sent other nonmembers a notice that included audits of their expenses.

Even if *Tierney* can be distinguished on the speculative ground the panel below advanced, the panel's decision is still in direct conflict with other Sixth Circuit decisions. *See Weaver v. University of Cincinnati*, 970 F.2d 1523, 1538 (6th Cir. 1992) ("We agree . . . that . . . a public employer ha[s] duties separate and apart from those of the union. Both parties to a fair share agreement must be held accountable for their responsibility to see that *Hudson*'s commands are followed."); *Cramer v. Matish*, Nos. 89-1885/2077, at pp. 7-8, 1990 WL 169640 (6th Cir. 1990) (unpublished decision; App. H at 40a) ("Under *Hudson*, the public employer . . . has the primary duty to ensure that the plan is constitutionally valid") (citations omitted). *Cramer* and *Weaver* were brought to the attention of the panel; the panel ignored these decisions.

B. The Seventh Circuit

The decision of the panel also directly conflicts with the Seventh Circuit's decision in *Hudson v. Teachers Local No. 1*, 743 F.2d 1187 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986). As in this case, *Hudson* involved only the collection of agency fees; there was no other action taken against the fee payers. In discussing the public employer's Section 1983 liability for collection of agency fees absent compliance with the procedural protections required by the Constitution, the Seventh Circuit held: "the public employer must establish a procedure that will make reasonably sure that the wages of nonunion employees will

not be used to support those of the union's political and ideological activities that are not germane to collective bargaining." *Id.* at 1194.

In *Hudson*, it was not the public employer, but rather the union, which was arguing that the Constitution imposed no obligations on it. The Seventh Circuit rejected this argument:

> It is true that the union is a private entity; that the [school] Board, in withholding an "agency fee" from its employees' wages, was acting as the union's agent; and that section 1983 only reaches action under color of state law. But when a public employer assists a union in coercing public employees to finance political activities, that is state action; and when a private entity such as a union acts in concert with a public agency to deprive people of their federal constitutional rights, it is liable under section 1983 ***along with the agency***.

743 F.2d at 1191 (emphasis added). Again, this decision of the Seventh Circuit was ignored by the panel below.

C. The Third Circuit

The Third Circuit also interprets *Hudson* to require public employers to ensure that employees' constitutional rights are not violated by the employers' enforcement of an agency fee requirement. Like this case, *Hohe v. Casey*, 956 F.2d 399 (3rd Cir. 1992), was a suit seeking to enjoin the collection of agency fees where the union failed to provide audited financial disclosure. In holding that public employers were liable for

collecting agency fees where the procedural protections of *Hudson* had not been implemented, the Third Circuit stated:

> The [public employer] . . . may be enjoined from imposing the fair share fees on nonmembers when it is determined that the exclusive representative has not complied with the constitutional requirements [for their collection].

956 F.2d at 411. The court also stated:

> As we read [*Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), *Dean v. TWA*, 924 F.2d 805 (9th Cir. 1991),] and *Hudson*, the employer and the union must have a constitutional procedure in place *before* deducting fees. . . . [T]he requirement that a constitutional procedure be in place before fair share fees are collected simply means that if a court subsequently determines that the procedures are constitutionally inadequate, both the public employer and the [union] shall be accountable for the constitutional violation.

Id. at 405-06 (emphasis in original). Again, the *Hohe* decision was ignored by the panel below.

II. The Panel Decision Is Directly Contrary to This Court's Decision in *Hudson*

The panel below held that although *Hudson* imposes a legal obligation on public employers, that obligation does not apply to involuntary withholding. *Foster*, 268 F.3d at 694; App. A at 9a. ("Action more serious than the routine collection of fees is

required before the [public employer's] duty [arising under the Constitution] is triggered.") If that were true, then *Hudson* would have gone the other way. The Supreme Court's holding in *Hudson* was based on a similar automatic union fee deduction statute.[10] In *Hudson*, it was the school board's routine collection of agency fees and its blind adherence to the union's demand to commence fee withholdings that was the basis for the school board's liability.

> In October 1982, the Union formally requested the Board to begin making deductions . . . . The Board accepted the Union's . . . determination [that its expenditures were 95% chargeable] without questioning its method of calculation and without asking to review any of the records supporting it. The Board began to deduct the fee from the paychecks of nonmembers in December 1982. The Board did not provide the nonmembers with any explanation of the calculation, or of the Union's procedures.

Hudson, 475 U.S. at 296.

In *Hudson*, this Court set forth the constitutional minimum for the "collection" of agency fees. *Id.* at 310. Like this case, *Hudson* was a suit against a teachers' union and corresponding public employer. *Id.* at 297. In delineating the procedural safeguards which the Constitution requires for the collection of

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[10] *See* 475 U.S. at 295 n.1 (state statute provided that fair share fee "'shall be deducted by the [school] board from the earnings of the non-member employees and paid to the representative organization.'" (statutory citation omitted)).

agency fees, this Court stated: "Since the agency shop itself is 'a significant impingement on First Amendment rights,' the *government and union* have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." *Id.* at 307 n.20 (emphasis added, citation omitted) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)).

The Ninth Circuit dismissed this ruling by limiting its application to the employer's duty to make available an impartial decisionmaker before whom the amount of the fee could be challenged and who would render a prompt decision. No language in *Hudson*, however, leads to such a conclusion. To the contrary, the *Hudson* Court uses the plural–"procedures"–suggesting that the above-quoted language has application to all of the procedural safeguards required under *Hudson*. Moreover, earlier in the *Hudson* Court's analysis, in discussing the need for procedural safeguards, the Court makes clear that the procedural safeguards are directed primarily against the governmental employer:

> Procedural safeguards are necessary . . . [because] the nonunion employee–the individual whose First Amendment rights are being affected–must have a fair opportunity to identify the impact of the *governmental action* on his interests and to assert a meritorious First Amendment claim.

475 U.S. at 302-03 (emphasis added). The procedural safeguard required under *Hudson* which is directed toward enabling the fee payer to "identify the impact" of the agency shop upon his or her First Amendment interests is the financial disclosure in the

Hudson notice. *Hudson* made it clear that this information is required to protect the fee payer from "governmental action"–*i.e.*, the unlawful seizure of property. The governmental action in this context is the enforcement of the agency fee agreement in which the labor union (a non-governmental actor) is a joint participant with the government employer.[11]

The panel acknowledged that *Hudson,* in fact, imposed a legal duty on public employers to ensure the adequacy of the agency fee collection procedures.[12] But the *de facto* result of the panel's ruling is blanket immunity for public employers that enforce illegal agency fee demands, at least under state labor laws that permit withholding without the nonmember's authorization. There is no other action an employer takes to enforce an agency fee agreement. The employer's participation in the constitutional deprivation is no longer needed after the forced withholding. If an employer's constitutional duty does not arise at the time it takes an employee's property, it cannot arise thereafter. The panel neither addressed the implications of its ruling nor indicated what, if not forced withholding, triggers the employer's liability for its participation in the unlawful collection of agency fees.

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[11] *See Hudson v. Teachers Local No. 1*, 743 F.2d 1187 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986) (withholding of agency fee triggers public employer's constitutional obligations); *Hohe v. Casey*, 956 F.2d 399, 405 (3rd Cir. 1992) (same).

[12] App. A at 8a-9a.

Nowhere does *Hudson* suggest that either of the joint participants to the agency fee agreement can disregard any of the procedural safeguards required by the Constitution.

A. The Panel's Ruling Turns the State Action Doctrine on Its Head.

There is no dispute that the unions violated Section 1983 and the First Amendment by their participation in the forced collection of agency fees in violation of *Hudson*'s requirements. Labor unions, as private actors, generally cannot be held liable for violating Section 1983 or the Constitution unless they are joint participants in unlawful government action. Therefore, when this Court in *Hudson* imposed an obligation on the unions, it must also have imposed that obligation on the public employers. "Joint participation" was the only basis for union liability in *Hudson*. *Hudson*, 743 F.2d at 1191; 475 U.S. at 303.

Because the unions, unlike the school districts, are non-governmental actors, there is no intellectually tenable way to hold the unions, but not the school districts, liable for a constitutional violation arising out of joint participation in the enforcement of an agency fee agreement. *See*, *e.g.*, *Lowary v. Lexington Local Bd. of Educ.*, 704 F. Supp. 1430, 1449 (N.D. Ohio 1987).

> *Hudson* implicitly recognizes that it is the government employer and the union who share the duty in establishing a constitutionally valid fair-share fee procedure. The union's duty, after all, is derivative to the fact that the employer is a governmental actor. To permit a public employer to escape any duty in the implementation of the [agency fee] plan, would impose

> a governmental standard of conduct on a purely private entity. . . . Any equitable remedy must necessarily include the [public employer].

See also Mitchell v. Los Angeles Unified School Dist., 739 F. Supp. 511 (C.D. Cal. 1990):

> Indeed, it is the public employer's involvement in the agreement authorizing the seizure of the agency fees that gives rise to a claim by plaintiffs for deprivation of federally secured constitutional rights. And the public employer is the one that deducts the fee from its employees' paychecks. In short, dispense with the public employer and there would be no cause of action.
>
> > The court rejects the . . . argument that [the public employer] has no duty to ensure or establish the constitutionally adequate procedure described by *Hudson*. . . . The logic of *Hudson* itself contradicts this argument. Action under color of state law is a necessary element of a section 1983 claim. The administration of an agency shop by a public employer constitutes such state action, the Court in *Hudson* implicitly acknowledged, when it upheld the plaintiff's section 1983 claim against the Union and school board there.

Id. at 516 (quoting *Dixon v. City of Chicago*, 669 F. Supp. 851, 852 (N.D. Ill. 1987)).

Other than the panel below, every federal court that has ruled upon the issue of employer liability has adopted the above-stated reasoning.[13] No other federal court has dismissed a public employer from a suit alleging failure to comply with *Hudson*'s requirements on the reasoning that the employer owed no duty to its nonunion employees to abstain from illegal agency fee collection.

As in *Hudson*, the sole basis on which the unions are state actors subject to Section 1983 and the constraints of the Constitution is their joint participation with the government employer in enforcing the agency fee obligation. In this case, Petitioners brought to the panel's attention that the state action

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[13] Other decisions doing so include *Leer v. Washington Education Association*, 172 F.R.D. 439, 443 (W.D. Wash. 1997) ("If a public employer deducts the union's agency fee from its employees' wages, . . . both the public employer and the union can be held liable in a suit under 42 U.S.C. § 1983 for violating the nonmembers' right of free speech under the First and Fourteenth Amendments."); *Jordan v. City of Bucyrus*, 134 L.R.R.M. (BNA) 2564, 2565 (N.D. Ohio 1990) ("Inasmuch as the law is imposing certain duties on the public employer itself regarding the collection of agency and service fees for the Union, the Union is not an indispensable party for the purpose of this suit [alleging unconstitutional collection of service fees without the procedures required under *Hudson*] and its absence is not a basis for dismissal."); *Tierney v. City of Toledo*, 132 L.R.R.M. (BNA) 2825, 2834 (N.D. Ohio 1989) (union and public employer are jointly and severally liable in constitutional challenge to the union's agency fee procedure); *Lowary v. Lexington Local Board of Education*, 704 F. Supp. 1456, 1470 (N.D. Ohio 1988) ("[T]he public employer cannot blindly follow the lead of the union and then claim no responsibility for constitutional violations. . . . In this case, the constitutional violation has occurred and the [employer] is thus jointly liable . . . .").

doctrine requires Section 1983 liability for the employer where, there is union liability based on joint participation with the employer.[14] The panel failed to address this issue. As a consequence, the panel in this case reached the anomolous conclusion that, even though unlawful government action occurred, the government nonetheless did nothing unlawful and could not be enjoined.

The panel's ruling cannot be reconciled with employer liability cases even outside the forced unionism context. Public employers generally cannot escape liability for their conduct which violates their employees' civil rights on the excuse that they were simply (or even reluctantly) doing the bidding of others.[15]

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[14] *See* Plaintiffs'/Appellees' Opposition Brief, filed May 22, 2000.

[15] *See National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988). *Tarkanian* involved a suit by a college basketball coach who was suspended from employment at a public university. The impetus for the suspension was a report from the NCAA (a private entity) detailing numerous recruiting violations. The university at all times controverted the allegations and the findings of the report. In response to pressure from the NCAA which included threats of additional sanctions, the university acceded to the NCAA's demand and suspended the coach. The dominant issue in the case was whether the NCAA was acting under color of state law. The Court was narrowly divided on that issue. Nonetheless, the Court was unanimous that the actions of the public employer were state action subject to the constraints of the Constitution. 488 U.S. at 192-93; *id.* at 199 (White, J., dissenting) ("All agree that UNLV, a public university, is a state actor and that the suspension of [the coach], a public employee, was state action."). The relevance of *Tarkanian* is that public employers

(continued...)

The school districts admit that payment of the agency fee is a condition of employment.[16] It must be the rule that a public employer is responsible for unconstitutional terms and conditions of employment. That is no less true when the public employer commits the constitutional deprivation at the instance of the union.

The panel's aberrant decision cannot logically be reconciled with this Court's decision in *Hudson*.

III. The Panel's Decision Has the Practical Effect of Extinguishing the First Amendment Rights of Large Numbers of Nonunion Public-Sector Employees

Many states with public–sector agency shop permit involuntary withholding from payroll to enforce compliance with union subsidy obligations.[17] Involuntary withholding of union

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[15](...continued)
must adhere to the requirements of the Constitution and are liable for their actions which violate the constitutional rights of their employees, even where the action is taken at the instance of a private entity, such as a labor union.

[16] R. 1: Complaint, p. 8, ¶ 33; R. 17: Employers' Answer, p. 5, ¶ 33.

[17] Cal. Gov't Code § 3546(a) (West 2002); Conn. Gen. Stat. Ann. § 10-153(c) (West 2002); Del. Code Ann. tit. 14, § 4019(b) (2001); D.C. Code Ann. § 1-617.07 (2001); Haw. Rev. Stat. Ann. § 89-4(a) (LexisNexis 2001); 115 Ill. Comp. Stat. Ann. 5/11 (West 2002); Mich. Comp. Laws Ann. ch. 408.477, § 7(1) (West 2001); Minn. Stat. Ann. § 179A.06(3) (West 2001); N.J. Stat. Ann. (continued...)

fees appears to be the trend. California recently enacted or amended various public–sector labor statutes (each statute applicable to a different group of public-sector employees) which require employers to withhold agency fees even where the labor agreement does not contain an organizational security clause.[18]

The decision of the panel below practically, if perhaps not technically, extinguishes the constitutional rights of nonunion employees recognized in *Hudson*. As noted by the Seventh Circuit:

> [T]he amount of monthly deductions potentially at issue in cases such as this is small for each [dissenting] employee. As a result, most violations of the First Amendment caused by union-security clauses or union-shop clauses . . . would go unremedied–maybe even undetected–if the employer had no duty to establish workable procedures for protecting dissenters' rights.

Hudson, 743 F.2d at 1192.

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[17](...continued)
§ 34:13A-5.6 (West 2002); N.Y. Civil Service Law § 201(2)(b) (McKinney 2002); Ohio Rev. Code Ann. § 4117.09(C) (2001); Or. Rev. Stat § 243.672(1)(c) (1999); 43 Pa. Cons. Stat. Ann. § 1102.4(a) (West 2002); Wash. Rev. Code Ann. § 41.59.060(2) (West 2001); and Wisc. Stat. Ann. § 111.70(f) (West 2001).

[18] *See, e.g.*, Cal. Gov't Code § 3508.5(b) (affecting city, county, and municipal employees); Cal. Gov't Code § 3546(a) (affecting public school employees); Cal. Gov't Code § 3583.5 (affecting university employees); Cal. Gov't Code § 3515.7(b) (affecting state employees).

In a related context, the Sixth Circuit echoed the same sentiment in *Weaver v. University of Cincinnati*, 764 F. Supp. 1241 (S.D. Ohio 1991). In *Weaver*, the plaintiffs challenged the lawfulness of a clause in a labor agreement that indemnified an employer for liability and litigation costs incurred in enforcing an agency fee agreement. The court held that the clause was contrary to public policy. In so ruling, the court stated:

> The [public employer], through their indemnification agreement with [the union], have effectively destroyed the only realistic motivation an employer has to ensure an agency fee plan is constructed and administered correctly. By agreeing to indemnify the [public employer] for any constitutional deficiencies in their agency fee plan, [the union] enables [the employer] to escape liability for any action instituted by an employee challenging the validity of the agency fee plan. The [employer has] attempted to contract away the[] duty to protect the First Amendment rights of the nonmember employees. This [it] may not do.
>
> Nonmembers, who themselves have been forced to accept an impingement of their First Amendment rights, are entitled to the protection of a vigilant employer who is legally bound to ensure the constitutionality of an agency fee plan. The [indemnification] provision of the collective bargaining agreement violates this policy concern. Accordingly, this Court finds the indemnification clause to be void as against public policy.

Weaver, 764 F. Supp. at 1247.[19]

The decision of the panel below frustrates an essential deterrent to a union's disregard of the rights of nonunion employees.

CONCLUSION

The rule of law announced by the panel below, which now controls in the Ninth Circuit, conflicts with the decisions of other circuits, the decision of this Court in *Hudson*, and the decision of every other federal court that has addressed this issue. For the reasons stated above, the teachers respectfully request that this Petition for a Writ of *Certiorari* be granted and either the decision below be summarily reversed, or the case be set for plenary briefing and argument on the important question presented herein.

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[19] In affirming the district court, the Sixth Circuit held:

> Both parties to a fair share agreement must be held accountable for their responsibility to see that *Hudson*'s commands are followed. A clause that relieves the employer of all consequences for its failure to assume and conscientiously carry out its duties, including even the cost of defending legal actions, is against public policy.

Weaver, 970 F.2d at 1538.

Respectfully submitted,

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February 2002

APPENDICES

APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

5 November 2001

[268 F.3d 689]

Dianne FOSTER; D. Raymond Beasley; Howard W. Neely; Mark Albrecht; Barry Lee Parks; Sue Ann McPherson; Richard DiGiacomo; Marcia A. Hartman, Plaintiffs-Appellees,

v.

Joyce C. MAHDESIAN; Livermore Education Association; Mount Diablo Education Association; Fremont Unified District Teachers Association; Ukiah Teachers Association; New Haven Unified School District; Oak Grove Educators Association; East Side Teachers Association; Alameda Education Association; Livermore Valley Joint Unified School District; The Ukiah Unified School District; Local Union, Defendants,

and

Kim Logan, Superintendent; Joe Coto, Superintendent East Side Union High School District; Lorraine Garcy, in her official capacity as Superintendent, Board of Education, Livermore Valley Joint School District; Ruth McKenna, in her official capacity, Superintendent, Board of Education, New Haven Unified School District, Defendants-Appellants.

No. 00-15028.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted May 18, 2001

Filed Oct. 15, 2001

As amended Nov. 5, 2001.

[691]Stephen P. Berzon, Jeffrey B. Demain, Altshuler, Berzon, Nussbaum, Rubin & Demain, San Francisco, California, for the defendants-appellants.

Milton L. Chappell, Mark J. Beutler, Dylan B. Carp, National Right to Work Legal Defense Foundation, Inc., Springfield, Virginia, for the plaintiffs-appellees.

Appeal from the United States District Court for the Northern District of California; Charles A. Legge, District Judge, Presiding. D.C. No. CV-97-04433-CAL.

Before: HUG, Jr. and T.G. NELSON, Circuit Judges, and PREGERSON,* District Judge.

DEAN D. PREGERSON, District Judge:

The question raised in this appeal is whether a public sector employer who deducts agency or "fair share" fees from a non-union employee's paycheck may be held liable when the local union fails to provide the employee with the financial disclosure required by *Chicago Teachers Union Local No. 1 v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1996). Diane Foster and seven other nonunion public school teachers (collectively, "the plaintiffs") sued their local teachers unions and the superintendents of the school districts for which they worked

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* Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

("the superintendents")[1] under 42 U.S.C. § 1983. The district court held that the financial disclosure provided by the unions was deficient under *Hudson*. Relevant to this appeal, the district court also held that the superintendents violated the plaintiffs' rights by withholding or collecting agency fees from the plaintiffs despite the union's flawed notice.[2] The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. § 1983. We have jurisdiction pursuant to 28 U.S.C. § 1292(a). We reverse and remand.

I. BACKGROUND

Pursuant to California law and provisions in the collective bargaining agreements ("CBAs") governing their employment, the plaintiffs–who are not members of their local teachers union–are required to pay "agency" or "fair share" fees to those unions. *See* Cal. Gov't Code §§ 3502.5(a), 3540.1(i), 3546. These fees, which are designed to compensate the un-[692]ions for the benefits that the plaintiffs receive from collective bargaining,[3] are

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[1] The plaintiffs sued the superintendents in their official capacity.

[2] By the time the district court granted summary judgment, only four of the eight original plaintiffs retained standing to pursue their claims. Accordingly, only four plaintiffs–Richard DiGiacomo, Diane Foster, Barry Lee Parks, and Mark Albrecht–are currently before this court.

[3] In *Abood v. Detroit Board of Education,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Supreme Court held that a public employer and the union serving as the employees' exclusive bargaining representative may, consistent with the First Amendment, agree to

(continued...)

automatically deducted from the plaintiffs' paychecks by their school district employers[4] and passed on to the unions.

Unions sometimes engage in activities unrelated to collective bargaining, such as contributing to political candidates and ideological causes. Agency fee payers,[5] such as the plaintiffs, may not be required to support such activities. They may only be

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[3] (...continued)
require those employees who choose not to become union members to pay an "agency fee" to the union "to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment." *Id.* at 225-26, 97 S.Ct. 1782. This is because "Congress determined that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost, and that legislative judgment was surely an allowable one." *Id.* at 219, 97 S.Ct. 1782 (citing *Railway Employees' Dept. v. Hanson,* 351 U.S. 225, 235, 76 S.Ct. 714, 100 L.Ed. 1112 (1956)).

[4] The school districts may withhold agency fees from the plaintiffs' paychecks without the plaintiffs' authorization. *See* Cal. Ed.Code § 45061; *Cumero v. Public Employment Relations Board,* 49 Cal.3d 575, 262 Cal.Rptr. 46, 778 P.2d 174 (Cal.1989) (where nonmember of union chose not to pay service fee under organizational security arrangement, school district was entitled to deduct service fee from nonmember's paycheck, even before such deductions became expressly authorized by section 45061).

[5] Nonunion teachers are called agency fee payers because they pay fees under the terms of their employers' agency shop agreements. In contrast, union teachers pay "membership dues."

charged a pro rata share of the union's expenditures on activities germane to representation.[6]

To ensure that agency fee payers are not required to pay fees in excess of those properly chargeable, they are afforded three procedural protections. First, agency fee payers are entitled to "an adequate explanation of the basis for the fee," which "include[s] the major categories of expenses, as well as verification by an independent auditor." *Hudson,* 475 U.S. at 307 n. 18, 310, 106 S.Ct. 1066.[7] This explanation is called a "*Hudson* notice." Second, unions must provide fee payers with "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." *Id.* at 310, 106 S.Ct. 1066. Finally,

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[6] Chargeable fees are comprised of "not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks,* 466 U.S. 435, 448, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). Non-chargeable fees include those expenditures that "support or advance the union's political or ideological causes." *Prescott v. County of El Dorado*, 177 F.3d 1102, 1106 (9th Cir.1999), *vacated,* 528 U.S. 1111, 120 S.Ct. 929, 145 L.Ed.2d 807, *reinstated,* 204 F.3d 984 (9th Cir.2000).

[7] In *Prescott,* this court made "it clear that the financial statements accompanying the notice must be audited (not merely reviewed) in order to *assure* that the union has actually spent the amounts of money it claimed to have spent on the chargeable activities." 177 F.3d at 1112 (emphasis in original) (internal quotations and citations omitted).

unions must create "an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.*

In this case, the unions failed to meet *Hudson's* first requirement: provision of [693]an adequate notice. The plaintiffs sued not only the union, but also the superintendents. The plaintiffs claimed, and the district court held, that the superintendents have a legal duty to ensure that the union complies with the *Hudson* notice requirement before deducting any agency fees. The superintendents appeal.

II. STANDARD OF REVIEW

We review a grant of summary judgment de novo. *See Weiner v. San Diego County,* 210 F.3d 1025, 1028 (9th Cir.2000).

III. DISCUSSION

The superintendents argue that, pursuant to *Knight v. Kenai Peninsula Borough School District,* 131 F.3d 807 (9th Cir.1997), *cert. denied sub nom. Anchorage Education Association v. Patterson,* 524 U.S. 904, 118 S.Ct. 2060, 141 L.Ed.2d 138 (1998), and *Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232, a duty to evaluate the sufficiency of the union's notice did not arise under the facts of this case. In *Knight,* this court determined that an employer may not be held liable for failing to examine a union's deficient notice before the notice is sent to employees. *See Knight,* 131 F.3d at 817. Although the *Knight* court recognized that a school district has some duty to ensure that its employees receive proper notice, that duty only arises "at the time the union seeks to take action against a nonmember for failure to

pay the agency fee...." *Id.* In other words, under *Knight,* "the school district cannot take adverse action against the nonmember employee without first ensuring that the nonmember's constitutional rights were not violated by [the union]." *Id.* (citing *Tierney v. City of Toledo,* 824 F.2d 1497, 1504 (6th Cir.1987)).

The district court held, and the plaintiffs argue, that the deduction of agency fees from the plaintiffs' salaries constitutes "adverse action" under *Knight.* We disagree. The "adverse action" contemplated by *Knight* must be more serious than the routine collection of fees despite a union's failure to provide a proper notice. In other words, the routine collection of agency fees does not trigger a duty on the part of the employer to ensure that every employee has received a proper *Hudson* notice.

In coming to the opposite conclusion, the district court relied on a portion of *Knight,* which, if read on its own, might well lead to the conclusion that the employer's deduction of fees without determining whether the union's notice was proper constitutes adverse action. *Knight* favorably cites a Sixth Circuit case, *Tierney v. City of Toledo,* 824 F.2d 1497 (6th Cir.1987), in support of the proposition that an employer's duty to review the constitutionality of a union's procedures arises when the union seeks adverse action against an employee. *Knight,* 131 F.3d at 817. *Tierney,* in turn, states that "no union or employer may take any action to enforce a non-union member's duty to pay any dues, whether through a deduction from wages or payment from wages already paid, until a plan with procedures meeting the commands of ... *Hudson* is established and operating." *Tierney,* 824 F.2d at 1504. This might lead one to the conclusion that deducting fees constitutes adverse action. There are two problems, however, with such a conclusion.

First, although *Knight* cites *Tierney* favorably in the portion described above, it does so immediately after criticizing the case in significant measure. *Knight,* 131 F.3d at 817. *Tierney* derived a duty for employers to ensure proper notice from a part of *Hudson* that addressed an employ-[694]er's duty to ensure that a reasonably prompt decision by an impartial decisionmaker was available before taking adverse action. *Id. Hudson* mentioned no duty on the part of the employer associated with proper notice. *Id.* (citing *Hudson,* 475 U.S. at 307 n. 18, 106 S.Ct. 1066). The *Knight* court questioned the appropriateness of such an extension of the duty to the notice context. Thus, when read in toto, *Knight* calls into question *Tierney*'s reasoning regarding an employer's duty to ensure adequate notice.

Second, when examined closely, *Tierney* itself does not stand for the proposition that employers must ensure that proper notice is given to each individual before fees are deducted. *Tierney* requires that a *plan* comporting with *Hudson* be in place before fees are deducted. *Tierney,* 824 F.2d at 1504. This is little more than *Hudson* requires. It is quite possible that, despite the existence of an appropriate plan meeting all the *Hudson* requirements, some individuals might not receive a proper notice in every instance. Such occurrences would not, even under *Tierney,* preclude the routine deduction of fees by the employer. They would merely be grounds for challenging the union's accounting. Thus, even if *Tierney* were binding precedent in this circuit, it would not control the outcome of this case. The plaintiffs do not argue that no plan was in place; they have merely demonstrated that they received an inadequate notice.

Although employers certainly owe nonunion member employees the general duty set forth in *Hudson* of ensuring that

procedures exist "that minimize impingement and that facilitate a nonunion employee's ability to protect his rights," *Hudson,* 475 U.S. at 307 n. 20, 106 S.Ct. 1066, they owe no specific duty to employees to ensure that a proper *Hudson* notice is received by each employee before agency fees are deducted. Action more serious than the routine collection of fees is required before the duty discussed in *Knight* is triggered.[8]

Accordingly, we reverse and direct entry of summary judgment for the superintendents.

REVERSED.

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[8] We note that when examined closely, the resolution of one of the plaintiffs' claims in *Knight* supports our holding. One of the eight plaintiffs involved in the *Patterson* case, which was one of the cases consolidated into the *Knight* appeal, authorized the deduction of agency fees from his pay when he received a letter from the union demanding payment or threatening discharge. *Knight,* 131 F.3d at 811. He subsequently sought to revoke the authorization, but the school district refused. The other seven plaintiffs successfully withheld payment of any fees. *Id.*

Aware that the employer-defendant had deducted fees from one of the plaintiffs' paychecks against his wishes, the *Knight* court nevertheless held as to all plaintiffs, that the school district's duty to evaluate the sufficiency of the union's *Hudson* notice was not triggered. Implicit in that holding is the holding we reach today: that the non-consensual deduction of agency fees does not trigger a duty on the part of the school district to ensure that a proper *Hudson* notice was given by the union.

APPENDIX B

ORDER ON SUMMARY JUDGMENT AND ON MOTION FOR RECONSIDERATION IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

22 October 1999

[Clerk's stamps omitted in printing]

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

DIANNE FOSTER, *et al.*, Plaintiffs,	)	Civil Action No. C97-4433 CAL
v.	)	[~~PROPOSED~~] ORDER ON SUMMARY JUDGMENT AND ON MOTION FOR RECONSIDERATION
LORRAINE GARCY, in her official capacity as Superintendent, Board of Education, Livermore Valley Joint School District, *et al*, Defendants.	)	

In this case, nonunion public school teachers sued (1) the local teachers unions which represent them in collective bargaining and (2) various public officials who are sued in their official capacities as superintendents of the school districts which employ the plaintiffs. The plaintiffs are present and former certificated public school teachers. They challenge the procedures under which they are required to pay agency fees to the unions. Specifically, the plaintiffs contend that *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986), and subsequent cases interpreting that decision require unions, as a precondition to collecting agency fees, to provide nonmembers with independently audited financial disclosure of the union's chargeable expenses – i.e., the union's expenditures germane to discharging its duties as collective bargaining agent. The defendants contend that the *Hudson* line of decisions does not require unions to provide nonmembers with audited financial disclosure of chargeable expenses where doing so would present an economic hardship disproportionate to the benefit to be derived from the audit. The employer defendants further contend that under the Ninth Circuit's decision in *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807, 817 (9th Cir. 1997), public employers have no legal duty to ensure that the union has complied with the procedural safeguards required by *Hudson* before commencing involuntary collection of agency fees.

The plaintiffs and the employer defendants timely moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The labor union defendants cross-moved for summary judgment and the employer defendants joined the unions' cross motion. The matter came on for hearing on April 23, 1999 at which time the Court issued a bench ruling granting plaintiffs' motion in part, but denying the plaintiffs' claims for restitution.

In the ruling announced from the bench, the Court held that under the Ninth Circuit's decision in *Knight*, 131 F.3d 807, public sector labor unions are required to provide nonunion employees with audited financial disclosure of the expenditures which support the chargeable agency fee. Shortly after this Court announced its ruling, the Ninth Circuit issued its decision in *Prescott v. County of El Dorado*, 177 F.3d 1102 (9th Cir. 1999). With leave of the Court, six of the defendants (the small and medium-sized union defendants and the corresponding employer defendants) moved for reconsideration of the Court's April 23rd decision in light of the intervening *Prescott* decision. The matter again came on for hearing August 6, 1999.

The Court, having heard the arguments of counsel and having examined all briefs, memoranda of law, declarations, deposition transcripts, discovery responses and other records filed in connection with the motions and cross-motion, and being otherwise fully advised in the premises, makes the following:

I. Findings of Undisputed Facts

1. At all relevant times, the plaintiffs were not members of the labor union defendants.

2. The school districts and the local teachers unions have entered into collective bargaining agreements which require the school districts to withhold union agency fees from the plaintiffs' salaries.

3. Pursuant to the applicable California statute, Cal. Educ. Code § 45061, the school districts withhold agency fees from the plaintiffs' pay without the plaintiffs' authorization.

4. Although an agency fee equal to full union dues was initially withheld from the plaintiffs' pay and paid to the union defendants, the plaintiffs' agency fees were held in escrow until

the chargeable portion was ascertained and the remainder was subsequently rebated to the plaintiffs.

5. For all accounting periods at issue here, the union defendants provided to the plaintiffs a separate accounting of the chargeable and nonchargeable expenditures of the local union representing the plaintiffs' bargaining unit. These accountings were one-page or two-page unaudited, itemized lists of the major categories of expenses with related balances. The accountings contained expenditure categories classified as chargeable or nonchargeable and a calculation of the chargeable and nonchargeable expenditure ratio.

6. Although a higher ratio of chargeable and nonchargeable expenses was reflected in each of the local union's accountings, the local unions computed the agency fee based on the lower ratio of chargeable and nonchargeable expenses of the California Teachers Association, the affiliated parent labor organization.

7. Although the evidence is unclear whether all of the plaintiffs received one of these accountings for each fiscal year in question, the Court's decision does not depend upon resolution of this question. It is undisputed that none of the plaintiffs was provided with any financial statements or other financial disclosure of the local union evidencing an independent audit or any other form of independent verification.

8. In each of the years relevant to this action, the plaintiffs received on behalf of the statewide affiliate of the defendant local unions (the California Teachers Association or "CTA") and the national affiliate of the defendant local unions (the National Education Association or "NEA") financial statements that were audited by independent auditors and which included statements of chargeable and nonchargeable expenditures. In this case, the

plaintiffs have not challenged the financial disclosure provided by the CTA or the NEA.

9. The Plaintiffs have not raised any challenge in this action to the chargeable or nonchargeable classification of any union expenditures by any of the defendant local unions, the CTA, or the NEA.

10. Prior to the summary judgment hearing, plaintiffs Howard W. Neely and Marcia Hartman discontinued their employment as public school teachers with the Fremont Unified School District and the Alameda Unified School District, respectively. Accordingly, these two teachers no longer pay agency fees to any labor union defendants. In a March 29, 1999 order in this case, defendants Sharon Jones, Superintendent of the Fremont Unified School District, and Dennis Chaconas, Superintendent of the Alameda Unified School District, were dismissed as defendants since the sole claim against them for injunctive relief was rendered moot by those plaintiffs' retirements. Since the summary judgment hearing, plaintiffs D. Raymond Beasley and Sue Ann McPherson have also discontinued their employment as public school teachers with the Mount Diablo Unified School District and the Oak Grove School District, respectively. Accordingly, these two teachers no longer pay agency fees to any labor union defendants, and any claim against their school districts for injunctive relief has now been rendered moot by those plaintiffs' retirements.

II. Conclusions of Law

1. The decisions of the Ninth Circuit Court of Appeals in *Prescott v. County of El Dorado*, 177 F.3d 1102 (9th Cir. 1999), and *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807 (9th Cir. 1997), control the disposition of this case.

2. The *Knight* Court's discussion of the audit requirement sets forth a rule of law, not a rule of reason. *Knight* requires public sector labor unions to provide agency fee payers with audited financial disclosure as a precondition to collecting agency fees. In determining whether the labor union defendants complied with their financial disclosure obligations, based on the precedent in *Knight*, this Court held – and the *Prescott* Court subsequently reaffirmed – that the Court is not to weigh the cost to the union and the practicality of the procedures against the nonmembers' First Amendment interests. *Prescott*, 177 F.3d at 1108.

3. In their motion for reconsideration, the three small and medium sized labor union defendants and the three corresponding employer defendants urge that language from the *Prescott* Court's decision suggests that something other than audited financial disclosure would satisfy the defendants' financial disclosure obligations. As this Court reads the *Prescott* decision, the financial information provided to the agency fee payers in the *Hudson* notice must meet three criteria. First, that information must be independently verified by a source outside the union. Second, that information must employ some auditor verifiable methodology. Third, the information must be sufficient to allow nonunion members a reasonable opportunity to gauge whether the money taken from them is being spent on chargeable expenses.

4. The financial disclosure provided to the plaintiffs in this case did not meet the first requirement prescribed by the *Prescott* Court – independent verification from a source outside the union. The unions' financial disclosure for the years here at issue therefore does not conform to the requirements of *Hudson*. The Court therefore need not and does not reach the issue of whether the financial disclosure previously provided, or the financial

disclosure to be provided under the unions' revised agency fee procedures, conforms to the other two requirements of *Prescott*.

5. The use of the local presumption does not excuse the labor unions from disclosing the major categories of expenses verified by a source independent of the union, as required under *Hudson* and *Prescott*. What additional use can be made of the local presumption in the agency fee arbitration proceedings is not presently before the Court and the Court will not address that issue.

6. Prior to the decision in *Prescott*, this Court ruled that the plaintiffs are not entitled to restitution of the agency fees collected in violation of *Hudson* based on the precedents in *Lowary v. Lexington Bd. of Educ.*, 903 F.2d 422 (6th Cir. 1990), and *Hohe v. Casey*, 956 F.2d 499 (3d Cir. 1992). That ruling has now been reaffirmed by the *Prescott* Court. The plaintiffs are entitled only to the nonchargeable portion of the agency fee not already rebated to them. The plaintiffs have presented no evidence that they were forced to subsidize nonchargeable activity.

7. The Court in *Knight* held that the employer cannot take adverse action against nonmember employees without first ensuring that the nonmembers' constitutional rights were not violated. The *Knight* Court's citation to *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), reflects that Court's endorsement of the principle that an employer's deduction from wages constitutes sufficient adverse action to implicate the public employer's duty to assess the sufficiency of the union's *Hudson* notice. Therefore, the public employers in this case are liable because they failed to ensure that the plaintiffs' constitutional rights had been observed prior to commencing involuntary withholding of the agency fees.

8. With regard to the summary judgment motions and cross-motions, the Court denies the union defendants' motion for

supplemental briefing and the plaintiffs' motions to strike declarations.

9. Due to the discontinuation of their employment by plaintiffs D. Raymond Beasley and Sue Ann McPherson, their claims against the Superintendents of their employers are moot, as are their claims for equitable relief against the local unions that represent them. For that reason, defendant Paul Allen, Superintendent of the Mount Diablo Unified School District, and defendant Manny Barbara, Superintendent of the Oak Grove School District, are hereby dismissed with prejudice as defendants in this case.

10. The plaintiffs' entitlement to costs and reasonable attorney's fees under 42 U.S.C. § 1988 and the availability of any defenses thereto shall be determined by separate motion and adjudication.

Upon the foregoing, the Court hereby orders that the motions for summary judgment are **GRANTED** in part and **DENIED** in part, the motion for reconsideration is **DENIED**, and judgment is hereby entered as set forth below:

A. The Court **ORDERS** that, whereas plaintiffs D. Raymond Beasley and Sue Ann McPherson have asserted no claims against their employers other than the claims for injunctive relief, which are now moot, defendants Paul Allen and Manny Barbara, sued in their official capacity as the Superintendents of the Mount Diablo Unifed School District and the Oak Grove School District, respectively, are **DISMISSED** from this case with prejudice.

B. The Court **DECLARES** that the defendant labor unions and the remaining defendant public officials sued in their official capacities as school district superintendents, by withholding or collecting agency fees from the plaintiffs where the plaintiffs were not provided independently verified financial

disclosure of the local union's major categories of expenses have violated the plaintiffs' rights as set forth in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807 (9th Cir. 1997), and *Prescott v. County of El Dorado*, 177 F.3d 1102 (1999).

C. The claims for injunctive relief brought by the four plaintiffs who have discontinued their employment, Howard W. Neely, Marcia Hartman, D. Raymond Beasley, and Sue Ann McPherson, are now moot. With respect to the claims for injunctive relief by the other plaintiffs, Dianne Foster, Mark Albrecht, Barry Lee Parks, and Richard DiGiacomo, the relevant parties have entered into a stipulation of injunctive relief which is incorporated herein. Accordingly, the Court **ENJOINS** defendants Livermore Education Association, Ukiah Teachers Association, New Haven Teachers Association, East Side Teachers Association, Lorraine Garcy in her official capacity as the Superintendent of the Board of Education of the Livermore Valley Joint School District, Kim Logan in her official capacity as the Superintendent of the Ukiah Unified School District, Ruth McKenna in her official capacity as the Superintendent of the Board of Education of the New Haven Unified School District, and Joe Coto in his official capacity as the Superintendent of the East Side Union High School District from collecting or withholding from the wages and salaries of plaintiffs Foster, Albrecht, Parks and DiGiacomo any amounts to be paid to the enjoined union defendants for agency fees until either (1) those union defendants provide those plaintiffs with independently verified financial disclosure of the local union's major categories of expenses and with the union's allocation of those expenses between chargeable and non-chargeable categories, as required by *Hudson*, *Knight* and *Prescott*, and as discussed above in the Conclusions of Law; or (2) the procedures set forth in the

Stipulation of Injunctive Relief dated October 22, 1999 and duly executed by the parties' representatives have been complied with.

D. The Court **ORDERS** each of the labor union defendants to pay nominal damages to the plaintiff in the bargaining unit which it represents in the amount of one dollar ($1.00) for the constitutional deprivation occasioned by the illegal withholding of agency fees.

E. The Court **RESERVES JURISDICTION** over this case for the purpose of implementing this Order and the Stipulation of Injunctive Relief, and to resolve any controversies that may arise between the parties as to whether the financial disclosure that is actually provided by the union defendants to the plaintiffs in future years complies with the standards set forth above and in the Stipulation of Injunctive Relief.

The Clerk of the Court is directed to enter final judgment consistent with this Order, incorporating the Court's reservation of jurisdiction set forth in the preceding paragraph.

DATED this 22 day of October, 1999.

/s/
Charles A. Legge
United States District Judge

Presented by:

/s/

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APPENDIX C

JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 November 1999

[Clerk's stamps omitted in printing]

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DIANNE FOSTER, D. RAYMOND BEASLEY, HOWARD W. NEELY, MARK ALBRECHT, BARRY LEE PARKS, SUE ANN MCPHERSON, RICHARD DIGIACOMO, MARCIA HARTMAN, Plaintiffs, v. LORRAINE GARCY, in her official capacity as Superintendent, Board of Education, LIVERMORE VALLEY JOINT	Civil Action No: C97-4433 CAL **JUDGMENT**

SCHOOL DISTRICT; LIVERMORE EDUCATION ASSOCIATION; MOUNT DIABLO EDUCATION ASSOCIATION; FREMONT UNIFIED DISTRICT TEACHERS ASSOCIATION; KIM LOGAN, in her official capacity as Superintendent, UKIAH UNIFIED SCHOOL DISTRICT; UKIAH TEACHERS' ASSOCIATION; RUTH MCKENNA, in her official capa-city, Superintendent, Board of Education, NEW HAVEN UNIFIED SCHOOL DISTRICT; NEW HAVEN TEACHERS ASSOCIATION; OAK GROVE EDUCATORS ASSOCIATION; JOE COTO, in his official capacity as Superintendent, Board of Education, EAST SIDE UNION HIGH SCHOOL DISTRICT; EAST SIDE TEACHERS ASSOCIATION; ALAMEDA EDUCATION ASSOCIATION.

Defendants.

By order entered October 22, 1999, which is incorporated herein, the Court grants in part and denies in part the parties' motions and cross-motion for summary judgment.

It is hereby ORDERED, ADJUDGED and DECREED as follows:

A. Judgment for plaintiffs Dianne Foster, Mark Albrecht, Barry Lee Parks and Richard DiGiacomo and against Lorraine Garcy, in her official capacity as Superintendent, Board of Education, Livermore Valley Joint School District, Livermore

Education Association, Kim Logan, in her official capacity as Superintendent, Ukiah Unified School District, Ukiah Teachers Association, Ruth McKenna, in her official capacity as Superintendent, Board of Education, New Haven Unified School District, New Haven Teachers Association, Joe Coto, in his official capacity as Superintendent, Board of Education, East Side Union High School District, and East Side Teachers Association, is entered on the claims for declaratory and injunctive relief. With respect to these parties only, the Court:

(1) DECLARES that the defendants, by withholding or collecting agency fees from the plaintiffs where the plaintiffs were not provided independently verified financial disclosure of the local union's major categories of expenses have violated the plaintiffs' rights as set forth in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807 (9th Cir. 1997), and *Prescott v. County of El Dorado*, 177 F.3d 1102 (9th Cir. 1999).

(2) ENJOINS the defendants from collecting or withholding from the wages and salaries of the plaintiffs any amounts to be paid to the union defendants for agency fees until either (1) the union defendants provide the plaintiffs with independently verified financial disclosure of the local union's major categories of expenses and with the union's allocation of those expenses between chargeable and non-chargeable categories, as required by *Hudson, Knight* and *Prescott*, and as discussed in the Court's order dated October 27, 1999; or (2) the procedures set forth in the Stipulation of Injunctive Relief dated October 22, 1999 and duly executed by the parties' representatives have been complied with.

B. Judgment is entered for plaintiffs Dianne Foster, D. Raymond Beasley, Howard Neely, Mark Albrecht, Barry Lee Parks, Sue Ann McPherson, Richard DiGiacomo and Marcia Hartman and against the labor union defendants Livermore Education Association, Mt. Diablo Education Association, Fremont Unified District Teachers Association, Ukiah Teachers Association, New Haven Teachers Association, Oak Grove Educators Association, East Side Teachers Association and Alameda Education Association on the plaintiff's claims for nominal damages. The Court ORDERS each of the labor union defendants to pay nominal damages to the plaintiffs in the bargaining unit which it represents in the amount of one dollar ($1.00) for the constitutional deprivation occasioned by the illegal withholding of agency fees.

C. Judgment is entered for the labor union defendants Livermore Education Association, Mt. Diablo Education Association, Fremont Unified District Teachers Association, Ukiah Teachers Association, New Haven Teachers Association, Oak Grove Educators Association, East Side Teachers Association and Alameda Education Association and against the plaintiffs Dianne Foster, D. Raymond Beasley, Howard Neely, Mark Albrecht, Barry Lee Parks, Sue Ann McPherson, Richard DiGiacomo and Marcia Hartman on the plaintiffs' claims for retrospective monetary relief.

DATED: 11/9/99

/s/
Charles A. Legge
United States District Judge

PRESENTED BY:

/s/

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APPENDIX D

ORDER DENYING PETITION FOR REHEARING EN BANC IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

23 November 2001

[Clerk's stamp omitted in printing]
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIANNE FOSTER; D. RAYMOND BEASLEY; HOWARD W. NEELY; MARK ALBRECHT; BARRY LEE PARKS; SUE ANN MCPHERSON; RICHARD DIGIACOMO, MARCIA A. HARTMAN, Plaintiffs-Appellees, v. JOYCE C. MAHDESIAN; LIVERMORE EDUCATION ASSOCIATION; MOUNT DIABLO EDUCATION ASSOCIATION; FREMONT UNIFIED DISTRICT TEACHERS ASSOCIATION; UKIAH TEACHERS ASSOCIATION; NEW HAVEN UNIFIED SCHOOL DISTRICT; OAK GROVE EDUCATORS ASSOCIATION; EAST SIDE TEACHERS ASSOCIATION; ALAMEDA	No. 00-15028 D.C. No. CV-97-04433-CAL ORDER

EDUCATION ASSOCIATION; LIVERMORE VALLEY JOINT UNIFIED SCHOOL DISTRICT; THE UKIAH UNIFIED SCHOOL DISTRICT; LOCAL UNION,

Defendants

and

KIM LOGAN, Superintendent; JOE COTO, Superintendent East Side Union High School District; LORRAINE GARCY, in her official capacity as Superintendent, Board of Education, Livermore Valley Join[t] School District; RUTH MCKENNA, in her official capacity, Superintendent, Board of Education, New Haven Unified School District,

Defendants-Appellants.

Before: HUG and T.G. NELSON, Circuit Judges, and D. PREGERSON,* District Judge.

The motion to substitute plaintiffs/appellees' petition for rehearing en banc is granted. The substituted petition shall be deemed filed as of October 30, 2001.

The panel has voted to deny appellees' petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

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* Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

APPENDIX E

UNITED STATES CONSTITUTION
First Amendment

UNITED STATES CONSTITUTION
First Amendment

The First Amendment provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX F

UNITED STATES CONSTITUTION
Fourteenth Amendment

UNITED STATES CONSTITUTION
Fourteenth Amendment

The Fourteenth Amendment provides in pertinent part:

> **Section 1.** . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

CIVIL RIGHTS ACT OF 1871
42 U.S.C. § 1983 (West Supp. 2000)

CIVIL RIGHTS ACT OF 1871
42 U.S.C. § 1983 (West Supp. 2000)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

APPENDIX H

UNREPORTED DECISION IN *CRAMER v. MATISH*, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

2 November 1990

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924 F.2d 1057 (Table)
135 L.R.R.M. (BNA) 3000
Unpublished Disposition
(Cite as: 924 F.2d 1057, 1990 WL 169640
(6th Cir. (Mich.)))
NOTICE: THIS IS AN UNPUBLISHED OPINION.
* * *
United States Court of Appeals, Sixth Circuit.

Barbara CRAMER; James J. Achterhof; James P. Bebermeyer; Gary W. Bleyer; Lensowrth Cottrell, Jr.; James E. Crowley; Alan P. Damiano; Laura Daniel; Marlene A. Epley; Marta S. Goff; Lloyd R. Hagan; Vicki Peters; Deborah L. Roeske; Al Rollins; James E. Schmid; Larry Sutter, Plaintiffs-Appellants
v.
George G. MATISH, Director, et al. (Class Action); International Union, UAW; UAW, Local 600, Defendants-Appellees.

Nos. 89-1885, 89-2077.

Nov. 2, 1990.

On Appeal from the United States District Court for the Western District of Michigan, 88-00306, Benjamin Gibson, J.

W.D. Mich.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

Before BOYCE F. MARTIN, Jr. and WELLFORD, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

PER CURIAM.

[1]Plaintiffs, a class of Michigan state employees within the Michigan Human and Administrative Support bargaining units who have not signed an authorization for deduction of union representative service fees, appeal the district court's dissolution of a preliminary injunction preventing the automatic deduction of union agency shop fees from non-union employees' wages, the district court's denial of their claims for restitution, and the district court's denial of their request for class certification.

Plaintiffs brought this action seeking to enjoin the automatic deduction of union representation service fees from their wages under the 1988-90 collective bargaining agreement between the State of Michigan and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 6000-UAW. This is the second such action involving these groups. In the first, we held that the union's automatic deduction program failed to meet the requirements announced in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). *See Damiano v. Matish*, 830 F.2d 1363 (6th Cir.1987). After that decision, the union and the state revised their collective bargaining agreement to comply with *Hudson*.

Under the 1988-90 collective bargaining agreement at issue in this case, a service fee was automatically deducted from plaintiffs', and other proposed class members', wages from July 1, 1988 through June 30, 1989 in the amount of 87.3% of the full

union dues for union members. Plaintiffs sought to enjoin the union from collecting any fair share deductions from non-union members, claiming that the union's new Agency Fee Payer Objection Policy, which allows for the automatic deduction of non-members' proportion of chargeable representation service fees, again failed to meet the constitutional requirements set forth in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), *Tierney v. Toledo*, 824 F.2d 1497, 1502 (6th Cir.1987), and *Damiano v. Matish*, 830 F.2d 1363 (6th Cir.1987). Consequently, the plaintiffs argued that non-members were not obligated to pay any service fees.

The district court granted a temporary restraining order on October 7, 1988, and, after hearing oral arguments, granted a preliminary injunction on October 28, 1988. In an Opinion and Order dated November 15, 1988, the district court found that the union's new policy was sufficient under *Hudson* in all respects except that it did not ensure that the presumption that the local union spent more of its time in chargeable collective bargaining activities than the international union, whose percentage of chargeable activity was used to set the 87.3% fair share deduction, was reliable as applied to Local 6000. The district court concluded that the international union was responsible for having a procedure that would provide a potential objector with information regarding the expenditures of his local union, or, if the fair share deduction was based on the local presumption, that the local presumption had a basis in fact. Thus, the district court required the international union to present evidence that the local presumption had a basis in fact for the present year and to provide a method whereby potential objectors would have assurance in ensuing years that the local presumption would have

continued reliability. The district court continued the preliminary injunction.

[2]The international union subsequently provided evidence to the district court that the local presumption had a basis in fact. In addition, the international union proposed to send an annual disclosure of Local 6000's expenditures along with the Agency Fee Objection Policy to provide potential objectors with the necessary information.

Since the union complied with the district court's mandate by providing a method by which potential objectors could evaluate the local presumption's reliability in ensuing years, the district court held that the union's plan met the constitutional requirements set forth in *Hudson*. Consequently on July 5, 1989, the district court granted defendants' motion for summary judgment, and denied plaintiffs' motion for summary judgment, reserving for further consideration plaintiffs' claims for restitution and their motion for class certification, and ordering that the preliminary injunction would expire on August 14, 1989.

In considering the plaintiffs' claims for restitution of the past service fees and plaintiffs' motion for class certification, the district court reasoned that a union is entitled to charge non-members their *pro rata* share of the expenses incurred in negotiating and administering a collective bargaining agreement. *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The district court stated that in order to remedy a deficiency in the union's policy, plaintiffs would be entitled to restitution of paid fees which were in fact unwarranted. That is, plaintiffs would be

entitled to recover only the amounts paid in excess of chargeable amounts.

Since the UAW originally deducted only 87.3% of the full UAW fees and since the UAW provided evidence to the district court that the percentage deducted was appropriate, the district court found that, having paid only their appropriate *pro rata* share, the plaintiffs were not damaged and were not entitled to any restitution award. The district court noted that under these circumstances, any award would be a windfall to the non-members who have been recipients of benefits provided by chargeable services. Further, the district court held that no persuasive evidence demonstrated how the plaintiffs were injured by paying only their *pro rata* share of chargeable expenditures. In this case, there was no harm to be compensated.

Based on its conclusions that no additional restitution was appropriate, the district court held that plaintiffs' motion to certify a class was rendered moot. Plaintiffs now appeal those rulings.

The plaintiffs contend that the district court erred in holding that an independent audit of the union's basic financial statement, but not its calculations and allocation of expenditures as chargeable or nonchargeable, was sufficient under *Hudson, Tierney, Damiano,* and *Gwirtz v. Ohio Educ. Ass'n*, 887 F.2d 678 (6th Cir.1989).

In *Gwirtz,* we held that:

> [3]a union must adequately explain the basis for a fair share fee and that "adequate financial disclosure would

> include the major categories of expenses and verification by an independent auditor.

Gwirtz, 887 F.2d at 681. As to verification, we specifically held that an auditor is not to make legal determinations such as whether a charge falls into the category of chargeable or nonchargeable. Rather, we held that an auditor's role is to verify the expenditures made by the union so as to ensure that the expenditures that the union claims it made for particular expenses were actually made for those expenses. 887 F.2d at 682 n. 3. We rejected the claim that *Hudson* requires a union to give the most detailed financial information, holding that *Hudson* mandates only the disclosure of "adequate" or sufficient information so that nonmembers, such as the plaintiffs, may "gauge the propriety of the union's fee." *Id.* at 682 (citing *Hudson*, 475 U.S. at 306).

Under the standards for gauging the adequacy of an audit recognized in *Gwirtz,* we reject the plaintiffs' contentions that auditors, by reason of an ability to assess chargeability of expenses, may do so. That is a legal determination. We also reject plaintiffs' contention that because *Gwirtz* dealt with an audited basic financial statement plus a supplemental audited statement, that more than a basic financial statement is required under *Hudson*. *Gwirtz* makes it clear that all that is required under *Hudson* is a disclosure revealing the major categories of expenses and an auditor's verification that the expenditures claimed by the union were actually made for those expenses. *See Lehnert v. Ferris Faculty Ass'n-MSA-NSA*, 893 F.2d 111, 112 (6th Cir.1989) (reaffirming *Gwirtz*). Having said that, we must remand because it is unclear that the district court took the *Gwirtz* requirements into account when it rendered its decision on this issue.

The plaintiffs next contend that the union's use of a "local presumption" instead of providing audited statements of the local's allocated chargeable and nonchargeable expenses does not comply with *Hudson*. The district court initially rejected the union's reliance on the presumption that local union's engage in more chargeable collective bargaining expenditures than the international union. The district court then allowed the union to develop a plan which will annually provide nonmembers with information ensuring the reliability of the local presumption. Then, because of supplemental information, ***but not an audit,*** regarding local expenditures, the district court determined that *Hudson* was satisfied. That supplemental information was only to the establishment that local unions spend more of their time on chargeable activities than international unions--that the local presumption has an "established basis in fact."

The plaintiffs argue that this local presumption violates *Tierney's* construction of *Hudson* where the court held that the "[*Hudson*] disclosure must include an audited, detailed accounting of local union payments to affiliated state and national labor organizations that will be used for agreement and non-agreement related purposes." *Tierney*, 824 F.2d at 1503 (citing *Hudson*, 106 S.Ct. at 1076 n. 18.). They argue that using a local presumption does not provide potential objectors with the information to which they are entitled under *Hudson*. We agree.

[4]In *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422 (6th Cir.1990) (*Lowary II*), the Court held that the local presumption employed by the union was unconstitutional. The Court recognized the argument, also tendered by the union in this case, that "because the [international] union spends a greater percentage on nonchargeable expenditures than do the local

[unions], any error in the precision of the presumption actually operates in favor of the nonmember payors." *Lowary*, 903 F.2d at 431.

In *Lowary,* the union failed to provide ***any*** empirical evidence that supported the premise that the state or international union spends a greater percentage on nonchargeable expenditures than the local unions. *Id.* Here, empirical information was provided by the union to support the local presumption. Nevertheless, we hold that as a matter of law, local presumptions circumvent *Hudson's* disclosure requirements and "increase[ ]the risk that the reduced fee collection from the objector would be in excess of what is appropriate. The presumption impermissibly shifts the burden of persuasion in arbitration. The nonmember's burden is simply to make his objection known." *Id.* at 431 (Citations and quotations omitted). Thus, we reverse the district court's determination that the union's use of a local presumption, even when augmented by some empirical evidence, met *Hudson's* disclosure requirements. We note that the union's point that the result of required independent audits at local unions will result in higher chargeable costs to nonmembers is no doubt true, but that is a decision for nonmembers to make. The use of a presumption does not meet our holding in *Tierney* that a "[*Hudson*] disclosure must include an audited detailed accounting of local union payments to affiliated state and national labor organizations that will be used for agreement and nonagreement related purposes." 824 F.2d at 1503. As *Lowery* recognized, without an independent audit of the local union, unions may "avoid providing ***audited and detailed*** financial statements to nonmembers concerning the local and district union affiliates in violation of *Hudson.*" 903 F.2d at 431. While providing that information may be burdensome, "[e]xcessive cost cannot form

the basis for allowing the union or the government to avoid *Hudson's* requirement that the procedures used by the union to allocate bargaining and administrative costs be carefully tailored to minimize the intrusion on the nonmembers' rights." *Id.* at 431-32.

The plaintiffs contend that the statement in the union's policy that arbitration shall be final and binding on objectors is unenforceable and should be removed from the policy. They state that since the district court noted that this limitation of objectors rights to bring § 1983 actions is prohibited, it was wrong to allow this statement to remain in the policy.

The plaintiffs assert that while the language is unenforceable, it will mislead average objectors to conclude that they may not go to court to assert denials of their first amendment rights after arbitration. They also assert that the clause indemnifying the state for constitutional violations is void because it is against public policy for the state to shirk its responsibilities. Under *Hudson,* the public employer, not the union, has the primary duty to ensure that the plan is constitutionally valid. *Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1192 (7th Cir.1984), *aff'd,* 475 U.S. 292 (1986); *Lowary v. Lexington Local Bd. of Educ.*, 704 F.Supp. 1430, 1449 (N.D.Ohio 1987), *reversed on other grounds,* 854 F.2d 131 (6th Cir.1988). Indemnification clauses in collective bargaining agreements which purport to relieve public employers from liability for violations of federal constitutional and civil rights are void as against public policy. *Stamford Bd. of Educ. v. Stamford Educ. Ass'n.*, 697 F.2d 70, 73-75 (2d Cir.1982). Without such a role, public employees would have no incentive to fulfill their constitutional duties. They assert that the district court's reluctance to modify a substantive term of the collective

bargaining contract is unsound. It is not a modification, rather, it is a voiding of the provision.

[5]We agree and upon remand, the district court is instructed to strike these misleading and void provisions from the policy.

Plaintiffs further assert that they are entitled to a complete refund of their total fees deducted from their wages when the *Hudson* procedural safeguards were not in effect. *Lowary v. Lexington Local Bd. of Educ.*, 854 F.2d 131, 134-35 (6th Cir.1988) (*Lowary I*). The district court held that they were entitled only to a return of the amount paid in excess of the nonchargeable amounts.

In *Lowary* (II), this Circuit dismissed the plaintiffs' reading of *Lowary* (I), and held, consistent with the district court's reasoning here, that nonmembers are only entitled to reimbursement of the nonchargeable portion of unconstitutionally collected fees. 903 F.2d at 432-33. Thus, we affirm the district court's decision on this issue.

We note that upon remand, the district court must consider the refund properly awarded to the nonmembers under the *Damiano* decision as well as under this decision. The groups may overlap or be quite distinct and the percentages of fair share deductions may be quite different under each contract.

We also note that because we have reversed the district court on the local presumption issue and there is a potential for reversal under *Gwirtz*, on remand, the district court should reissue an injunction against the collection of nonmembers' fair share

deduction and the district court should reconsider its class action certification decision.

Thus, we reverse in part, affirm in part, and remand for further proceedings in light of our opinion.

WELLFORD, Circuit Judge, concurring.

To the extent this decision is deemed consistent with *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir.1987) ("*Tierney* II"), I am in full accord. Another panel of this court very recently in "*Tierney* III", No. 88-4047, filed October __, 1990, made the following observations concerning *Tierney* II and our prior decision in this case:

> In *Tierney* II, we concluded, among other things, that the 1983 plan proffered by TPPA "contain[ed] no provision complying with *Hudson*'s requirements that detailed financial information concerning all major categories of union expenses, including those for payments made to affiliated unions, be audited by a certified public accountant independent of the union and provided to all non-members before any fees may be collected from them." 824 F.2d at 1506. We also more fully discussed the necessary financial disclosure:
>
> > *Hudson*'s second requirement is that the union procedure must "provide [ ] non-members with [ ]adequate information about the basis for the proportionate share." *Id.* In this regard the burden is upon the union to prove the proper proportion of union political expenses to total union expenditures. *Id.*

> To fulfill this burden, *Hudson* admonishes the union to give "*potential objectors* ... sufficient information to gauge the propriety of the union's fee," *id.* at 1076 (emphasis supplied), before it collects any fees from non-members.... The union's proportionate share figures for its "major categories of expenses, as well as verification by an independent auditor," must be disclosed to all non-members. *Id.* at 1076 n. 18. Such disclosure must include an audited, detailed accounting of local union payments to affiliated state and national labor organizations that will be used for agreement and non-agreement related purposes.

[6]824 F.2d at 1503; *accord Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir.1987). Further, the union must inform the non-members as to the amount of the service fee, as well as the method by which that fee was calculated. *Damiano*, 830 F.2d at 1370. "The union must therefore provide each non-union employee with adequate information in timely fashion to permit the member to enter an intelligent and informed objection to the use of his service fees if he desires." *Id.*

* * * *

First, reference to the financial disclosure documents was necessary not only because the rebate procedure incorporates these documents, but also because these documents contain the methodology used to calculate the agency fee. More importantly, *Hudson* admonishes that a constitutional plan must contain adequate disclosure which "would include the major categories of expenses, as well as verification by an independent auditor." 475 U.S. at 307 n. 18; *see also Damiano*, 830 F.2d at 1370 ("the union must provide this

> information to each employee ... to permit the employee to evaluate the calculation of the fees in order to make a reasonable appraisal of the fees preliminary to exercising the option to enter an objection to the union's decision"). These requirements are neither precatory nor self-enforcing.
>
> * * *
>
> Ensuring adequate disclosure to enable a non-member to object, however, is materially different from determining whether particular expenditures are chargeable or whether the calculations and methodology therefore are acceptable. The latter questions, to be sure, are not presented at this stage of the review. As the officers acknowledge, these issues are for the arbitrator in the first instance once a non-member has objected to the propriety of the particular agency fee.

I am not sure that the auditors in this case, as in *Tierney,* fully indicated exactly what they did ***actually*** to ***verify*** the expenditures in question, nor precisely "what procedures were followed' to verify that purported expenses in a broad general category were truly used in a proper chargeable context. (*Tierney III* at ___). For example, if the union claimed in its statements that travel expenses to a particular official to attend "a convention" were appropriately charged to plaintiffs, did the auditor verify whether the convention or related activities was political, ideological, or whether involved in collective bargaining, contract administration, or grievance adjustment process.

There is pending before the Supreme Court another challenge to changeability determinations following grant of certiorari in a case decided by this court, *Lehnert v. Ferris Faculty Association*, 881 F.2d 1388 (6th Cir.1989). It may be that the

Supreme Court may shed further light on the issues which concern us here in respect to union expenses, if any, attendant to "public relations," conventions, lobbying, and providing services to other bargaining units. *See also Lehnert v. Ferris Faculty*, 893 F.2d 111 (6th Cir.1989).

[7]I state my continuing concern about the implications of *Gwirtz v. Ohio Educational Association*, 887 F.2d 678 (6th Cir.1989) which seems inconsistent, not only with *Tierney* and other decisions in this circuit on what constitutes adequate and appropriate independent auditor verification, but also seems inconsistent with the Supreme Court requirements set out in *Chicago Teachers Union Local # 1 v. Hudson*, 475 U.S. 292 (1986). *See Mitchell v. Los Angeles University School District,* 1990 W.L. 7728 (C.D. Calif. May 31, 1990). *Tierney III* correctly sets out that a parent or international union must disclose to the local union how it spends local funds before objections are made and arbitration is made available "Now members are constitutionally entitled to disclosure of these payments *prior to objecting,* so that they can evaluate the basis for an objection and consequently protect their First Amendment rights." *Tierney III* at ___. *Tierney III* also mandates that an exhaustion clause "unduly implies a limitation upon the officers' constitutional rights ... the clause must be deleted." (*Tierney III* at ___).

I concur in the result reached here with these reservations.

Supreme Court, U.S.
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No. 01-1307

IN THE

Supreme Court of the United States

DIANNE FOSTER, MARK ALBRECHT, RICHARD DIGIACOMO, and BARRY LEE PARKS,
Petitioners,

v.

LORRAINE GARCY, in her official capacity as Superintendent, Board of Education, Livermore Valley Joint School District; KIM LOGAN, Superintendent, Ukiah Unified School District; JOE COTO, Superintendent, East Side Union High School District; RUTH MCKENNA, in her official capacity as Superintendent, Board of Education, New Haven Unified School District,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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May 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Court of Appeals properly held that a public employer incurs no liability under 42 U.S.C. § 1983 for failing to police the details of the union's annual agency fee notice issued pursuant to *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), unless the employer takes adverse action against the fee payers beyond making routine payroll deductions for agency fees.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT

We do not take issue with the facts stated in Petition's Statement of the Case (Pet. at 3-9), although we disagree with the characterizations and legal conclusions intertwined therein.

REASONS FOR DENYING THE WRIT

The Petition should be denied because it presents no important issue which requires the attention of this Court and,

moreover, identifies no square conflict between the circuits or between the Court of Appeals' decision and a decision of this Court:

First, the federal district courts retain the authority under the Court of Appeals' decision to issue temporary, preliminary and permanent injunctive relief to restrain the unlawful collection of agency fees, and such relief will be enforceable against public employers. Moreover, fee payers are better situated to assert and protect their own rights than are their employers. *See* Section I.

Second, the Court of Appeals' decision is not contrary to the state action doctrine and does not accord a blanket immunity to public employers from suit under 42 U.S.C. § 1983. Rather, it merely recognizes that the legal duties owed by a public employer to its fee-payer employees differ from those owed by the union that represents them. *See* Section II.

Third, the Court of Appeals decision is not in conflict with any of the decisions of the other circuits identified by Petitioners, nor is it in conflict with this Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), which did not address, much less resolve, the issue of the public employer's liability, *vel non*, for legal deficiencies in the union's *Hudson* notice. *See* Section III.

I. CONTRARY TO PETITIONERS' UNSUPPORTED ASSERTION, THE COURT OF APPEALS' DECISION WOULD NOT PRECLUDE A DISTRICT COURT FROM ISSUING AN INJUNCTION ENFORCEABLE AGAINST PUBLIC EMPLOYERS TO RESTRAIN AN UNLAWFUL AGENCY FEE COLLECTION

1. *Agency Fee Payers Can Still Obtain Injunctive Relief Against Unlawful Fee Seizures Under the Court of Appeals' Decision.* Petitioners' fundamental argument is that, under the Court of Appeals' decision, the federal courts will be powerless to halt the collection of agency fees where the union's *Hudson* notice does not comply with the requirements this Court set forth in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). As we show below, however, that argument is meritless.

Petitioners assert, without citing any supporting authority, that unless the courts impose upon public employers a legal duty to police the union's *Hudson* notice, "a court cannot enjoin the employers from taking employees' money and paying it to the unions; even where, as here, the court has found the unions are not lawfully entitled to the fees." Pet. at 3. Petitioners later continue that, because "[m]any states with public-sector agency shop permit involuntary withholding from payroll to enforce compliance with union subsidy obligations," the "panel's decision has the practical effect of extinguishing the First Amendment rights of large numbers of nonunion public-sector employees." Pet. at 22.

The well-established law, however, clearly provides to the contrary that the federal courts have ample authority to enjoin an unlawful agency fee collection even though (as the Court of Appeals decided) public employers have no legal duty to police the union's compliance with the details of *Hudson*'s requirements, absent some adverse action going beyond a mere payroll deduction. First, as Petitioners admitted in the

Court of Appeals, the presence of the public employer as a defendant in Section 1983 suits over allegedly deficient *Hudson* notices is not necessary for suit to be brought against the union. *See* Plaintiffs'/Appellees' Opposition Brief (hereinafter "Pls' Opp. Brf."), filed in the Ninth Circuit on or about May 10, 2000, at 23-24.[1]

Second, Federal Rule of Civil Procedure 65(d) clearly confers authority to the federal district courts to restrain an unlawful fee collection, through temporary, preliminary and permanent injunctive relief, regardless of the presence *vel non* of the public employer as a defendant to the action. Rule 65(d) states, in its entirety, as follows:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, *and upon those persons in active concert or participation with them* who receive actual notice of the order by personal service or otherwise.

Fed. R. Civ. P. 65(d) (emphasis added).

Rule 65(d) gives the federal district courts clear authority to issue temporary, preliminary and/or permanent injunctive

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[1] Petitioners' admission is supported by clear law. Where a private party acts "under color of" state law, it can be sued under 42 U.S.C. § 1983 without the presence of a public entity or employee as a defendant. *See, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Here, there is no question that the "under color of" state law requirement of Section 1983 is satisfied by the state statutes permitting school districts to enter into and enforce agency fee agreements, the agency fee agreements between the school districts and the unions in this case, and the actual withholding of the fees from the plaintiffs' paychecks. *See, e.g., id.*, 457 U.S. at 941-42.

relief against a union to restrain the collection of agency fees pursuant to a legally deficient *Hudson* notice. Such relief would also bind the non-party public employer which deducts the fees from the employees' paychecks, as long as it receives actual notice of the order, because the employer undoubtedly acts in "concert or participation" (Fed. R. Civ. P. 65(d)) with the union in deducting agency fees pursuant to an agency fee agreement. Thus, contrary to the Petition, the federal courts retain plenary power under the Court of Appeals' decision to restrain unlawful agency fee collections.[2]

Since the district courts can enjoin unlawful fee collections under the Court of Appeals' decision, Petitioners' request for *certiorari* can have no practical effect in this case. As Petitioners note, the district court did not grant nominal damages against the public employers here (Pet. at 8 n.7), a ruling that Petitioners did not appeal. As they also admit, Petitioners dropped their claim against the public employers for monetary relief, pursuant to the Eleventh Amendment. *Id.* Finally, review by this Court can have no practical effect even on an award of attorneys' fees to Petitioners. The defendants are signatory to an agency fee indemnification agreement whereby the unions promise to indemnify the public employers against agency fee litigation (including attorneys' fees), and thus even a fee award would ultimately be borne solely by the union defendants.[3]

2. *Petitioners' Argument that Public Employers Are Better Situated to Protect Fee Payers' Rights Than Are the Fee Payers Themselves Is Erroneous and, in Any Event, Does Not*

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[2] Petitioners complain, "At no time prior to the district court's ruling did the school districts discontinue the collection of agency fees from the teachers' wages." Pet. at 5. While that is true, Petitioners have no one to blame but themselves, as they failed even to seek a temporary restraining order or a preliminary injunction to halt the fee collection.

[3] Petitioners asserted no challenge to the indemnification agreement in this action.

Present an Issue Worthy of Certiorari. To the extent that Petitioners are seeking to argue that agency fee payers' rights will be infringed under the Court of Appeals' decision, notwithstanding the continued availability of injunctive relief against unlawful fee collection, because they will have to go to court to obtain such relief (*see* Petition at 22-25), that argument is no more persuasive.

In essence, Petitioners' argument is that public employers are better situated than are their agency fee payer employees to protect the fee payers' *Hudson* rights, so that public policy favors imposing on the employer a duty to evaluate the union's compliance with the details of *Hudson*'s requirements and to cease deducting the agency fee if the employer determines such compliance to be inadequate. This argument is based upon a false premise. Petitioners apparently contemplate the alternatives as litigation brought by the fee payers, on the one hand, versus a cost-free refusal of the public employer to continue collecting agency fees until the union complies in all respects with the details of *Hudson*, on the other hand. But a public employer's refusal to collect agency fees would invariably result in the union bringing a breach of contract claim against the employer to enforce the agency fee agreement, as to which each party would bear its own costs and fees *regardless of which side prevails.*[4] The fee payers, on the other hand, can recover their costs and fees under 42 U.S.C. § 1988, if they prevail.

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[4] Indeed, it is likely that such a claim would be subject to arbitration under the collective bargaining agreement, in which the union would prevail because arbitrators commonly refuse to look to external law but instead enforce the parties' agreement. *See, e.g, Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 10-11, 10 Cal. Rptr. 2d 183, 832 P.2d 899 (1992) (arbitrators need not apply external law). The union could then enforce the arbitration award in state court, since California does not permit its courts to refuse to enforce an arbitration award even where the arbitrator has committed patent legal error. *See id.*, 3 Cal. 4th at 33.

Thus, only where the fee payers act on their own behalf will the cost of vindicating their rights be borne by the union. Fee payers are therefore in a better position to safeguard their rights than is the public employer, since the threat of having to reimburse the fee payers for their attorneys' fees provides a strong incentive for the union to fulfill its *Hudson* obligations. Petitioners' effort to drag the public employer into their dispute with the union, and to saddle it with a Hobson's choice of either being sued by the fee payers if it continues to deduct agency fees or being sued by the union if it refuses to do so, is not supported by law, logic or public policy.

The public employer is also particularly ill-suited to intervene in the dispute between the union and its agency fee payers regarding the union's *Hudson* notice because well-established public policy prohibits it from interfering in the internal affairs of the union and the employees whom the union represents. *See* California Government Code § 3543.5(d) (prohibiting California public school districts from interfering in the administration of the unions representing their employees).

Consistent with this statutory mandate, the California Public Employment Relations Board ("PERB")—the state agency charged with interpreting and enforcing public employment bargaining laws including Government Code § 3543.5(d)[5]—has promulgated regulations specifying that the union, not the public employer, is responsible for informing the employees of the amount and basis for calculating the agency fee, as well as of the procedure for challenging it. 8 California Code of Regulations § 32992. Moreover, PERB has also specifically held that imposing

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[5] *See* California Government Code §§ 3541 (establishing PERB); 3541.3(g) (authorizing PERB "to adopt . . . rules and regulations to carry out the provisions and effectuate the purposes and policies of this chapter").

such a duty on the employer would conflict with the statutory prohibition on interference with the union's affairs. *San Ramon Valley Unified School District (Abbot)*, PERB Decision No. 751, 13 P.E.R.C. ¶ 20201 at p. 732 (1989); *accord Sweetwater Union High School District (Gerber)*, PERB Decision No. 1417, 25 P.E.R.C. ¶ 32024 (2001).

As PERB held in *Abbot*, the position espoused by Petitioners here "is incompatible with the entire notion of collective bargaining," because "[t]he 'arm's length' relationship required by collective bargaining recognizes that the employer and the union have conflicting interests" which "obviously render unworkable any scheme where the employer must police the union's actions, lest it be held liable for them." *Abbot*, 13 P.E.R.C. ¶ 20201 at p. 732. Moreover, as PERB also recognized, there are "practical reasons why creating such a duty [as to the employer] makes little sense," such as the fact that "[a] public school employer simply does not have the authority or resources to review union procedures and determine if they are statutorily or constitutionally adequate." *Id.*

The reasoning of *Abbot* is compelling. The public employer's role in the agency fee context is limited to deducting the fees and transmitting them to the unions; the employers retain no more control over the fees than they do over payroll deductions that they may make for the United Way or for other charitable organizations. The unions act alone and in their own interest in determining both the purposes for which agency fees shall be spent and the form and content of their *Hudson* notices. Moreover, public employers lack the information and expertise to look over the unions' shoulders and review the legality of their agency fee procedures. The Court of Appeals' decision is thus eminently reasonable, not only as a matter of law, but as a matter of public policy as well.

Finally, the authorities on which Petitioners' rely for their argument (*see* Petition at 23-25) are inapposite, as they concerned claims by fee payers that the indemnification provisions of agency fee agreements, whereby the unions promise to indemnify the public employers in the event of litigation over the withholding of agency fees, should be declared void as against public policy. In the present case, however, the courts below rendered no decision as to any indemnification provision for the simple reason that Petitioners brought no such challenge in this case. *See* Pet. App. A, B, C, D; Pls' Opp. Brf. at 41-42. There is thus no conflict between the Court of Appeals' decision and those relied on by Petitioners concerning the propriety of such indemnification provisions. Indeed, the Ninth Circuit has not yet ruled on that issue,[6] and thus there is no square conflict between the indemnification decisions relied upon by Petitioners and *any* decision of the Ninth Circuit.

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[6] In *Prescott v. County of El Dorado*, 177 F.3d 1102, 1111-12 (9th Cir. 1999), the Ninth Circuit rejected a challenge by agency fee payers to an agency fee indemnification provision, based upon lack of standing. This Court reversed and remanded that decision for reconsideration in light of its then-recent decision in *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). *See Prescott v. County of El Dorado*, 528 U.S. 1111 (2000). On remand, the Ninth Circuit in turn remanded the issue for reconsideration by the district court in the first instance, reinstating the remainder of its decision. *Prescott v. County of El Dorado*, 204 F.3d 984 (9th Cir. 2000). On remand, the district court adhered to its prior ruling that the fee payers lacked standing, after reconsideration of the issue under *Laidlaw*. Plaintiffs' appeal from that decision is currently under submission to the Ninth Circuit, which heard oral argument on April 9, 2002. *See* http://www.ca9.uscourts.gov/ca9/calendar.nsf/a970-d6cd327cd7d1882564030063ce23/d3e08e46302910ca88256b8f00631765/$FILE/sf04_02.PDF

II. THE COURT OF APPEALS' DECISION IS NOT CONTRARY TO THE STATE ACTION DOCTRINE

Petitioners argue that the Court of Appeals' decision is contrary to the state action doctrine. *See* Pet. at 18-22. The crux of Petitioners' argument is their assertion that "[b]ecause the unions, unlike the school districts, are non-governmental actors, there is no intellectually tenable way to hold the unions, but not the school districts, liable for a constitutional violation arising out of joint participation in the enforcement of an agency fee agreement." Petition at 18. This assertion is incorrect.

To be sure, we do not dispute that the otherwise private labor organizations which receive agency fees pursuant to the state agency fee statutes are thereby suable under 42 U.S.C. § 1983 for violations of their *Hudson* obligations.[7] Likewise, Petitioners do not dispute that the public employer need not be named in such an action in order to sue the union. *See* Pls' Opp. Brf. at 23-24; *accord Lugar*, 457 U.S. at 941-42.

Petitioners' conclusion that "there is no intellectually tenable way to hold the unions, but not the school districts, liable for a constitutional violation arising out of joint participation in the enforcement of an agency fee agreement" (Petition at 18) does not follow from this premise, however. The public employer and the union are "joint[ly] participat[ing]" only in the sense that they are both operating under the agency fee agreement between them; in fulfilling its duties with regard to the notice, however, the union acts separately and independently of the employer. As the Court

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[7] *See* discussion, *supra*, at Section I(1), n.1. At the time the agency fee agreements at issue in this case were negotiated, California law permitted public school districts to negotiate such agreements with the unions that represent their employees. On January 1, 2001, that statute was amended to *require* the school districts to adopt agency fee arrangements upon the request of the union. *See* Cal. Gov't Code § 3546(a).

of Appeals held, each has separate and distinct legal duties and the violation by the union of its legal duty does not render the public employer vicariously liable therefor. There is nothing "intellectually [un]tenable" about such a division of duties, which corresponds to the aspects of the agency fee system that each controls.

Nor does the Court of Appeals' decision grant any "blanket immunity for public employers that enforce illegal agency fee demands." Pet. at 17. To the contrary, public employers remain liable to suit if they violate the legal duties *they* owe to fee payers. Thus, under both the Court of Appeals' decision (*see* Pet. App. A at 6a-9a & n.8) and the Ninth Circuit's prior decision in *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807, 817 (9th Cir. 1997), the public employer can incur liability if it takes affirmative action against a public employee, e.g., discipline or discharge, going beyond the mere routine deduction of fees, without making sure that the union fulfilled its notice obligations under *Hudson*.[8] For that reason, *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988), a decision relied on by Petitioners notwithstanding that it has nothing to do with agency fees (*see* Pet. at 21-22 n.15), is of no help to them since the public employer in that case in fact terminated the plaintiff's employment at the behest of a private entity.[9]

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[8] Plaintiffs are incorrect that because California law permits payment of agency fees by a nonconsensual payroll deduction, California unions will never need to seek disciplinary action against fee payers to enforce their agency fee obligation. *See* Pet. at 17. Since California Education Code § 45061 gives fee payers the option to pay agency fees directly to the union, rather than through a payroll deduction, a California union may need to request a public employer to take disciplinary action against a fee payer who elects to pay agency fees directly but then fails to do so.

[9] Moreover, none of the authorities relied upon by Petitioners for their "state action" argument (*see* Pet. at 18-22) are circuit court decisions, so Petitioners have failed to identify a circuit conflict on this issue.

III. THERE IS NO SQUARE CONFLICT BETWEEN THE CIRCUITS, OR BETWEEN THE COURT OF APPEALS' DECISION AND THIS COURT'S DECISION IN *HUDSON*

Petitioners also have failed to identify a square conflict between the circuits or between the Court of Appeals' decision and a decision of this Court.

1. Despite Petitioners' assertion, there is no conflict between the Court of Appeals' decision and prior decisions of the Sixth, Seventh and Third Circuits. Pet. at 10-14.

First, although Petitioners cite the Sixth Circuit's decision in *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), they concede that the Court of Appeals' decision "interpreted *Tierney* not to impose employer liability where the union put in place a *plan* comporting with *Hudson* but a nonunion employee nonetheless did not receive adequate notice . . . ." Pet. at 11 (emphasis in original).

Petitioners challenge the Court of Appeals' reading of *Tierney* on the ground that "*Tierney* requires not only that constitutionally adequate procedures be established, but also that these procedures be 'operating.'" Pet. at 11 (quoting *Tierney*, 824 F.2d at 1504, 1507). That observation does not a conflict make, however. As the Court of Appeals' decision reflects, "a plan comporting with *Hudson*" (Pet. App. at 8a, emphasis deleted) was not only in place but also operating when the fees were deducted. The dispute in this case was not that there was no "plan" in place and operating that generally complied with *Hudson*, but rather about whether the details of the plan or of the union's implementation of the plan complied with *Hudson* in every regard.

Second, there is no conflict with the Sixth Circuit's decision in *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992). *See* Pet. at 12. *Weaver* involved, in relevant part, a challenge brought by agency fee payers to

indemnification provisions of the agency fee agreements, pursuant to which the unions pledged to indemnify the public employers against liability in agency fee litigation. As noted above, the Court of Appeals' decision does not decide or even address any challenge to an agency fee indemnification clause for the simple reason that no such challenge was brought in this case, and indeed the propriety of indemnification provisions (and, for that matter, agency fee payers' standing to challenge them) is an open question in the Ninth Circuit. *See* discussion, *supra*, at Section I(2) and n.6.[10]

Third, there is no conflict with the Seventh Circuit's decision in *Hudson v. Teachers Local No. 1*, 743 F.2d 1187 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986). *See* Pet. at 12-13. Petitioners quote that decision as follows: "[T]he public employer must establish a procedure that will make reasonably sure that the wages of nonunion employees will not be used to support those of the union's political and ideological activities that are not germane to collective bargaining." Pet. at 12-13 (quoting *Hudson*, 743 F.2d at 1194). As we have already pointed out above with regard to *Tierney*, there is no conflict here because the Court of Appeals' decision reflects that "a plan comporting with *Hudson*" (Pet. App. at 8a, emphasis deleted) was in place and operating when the fees were deducted. To the contrary, the Seventh Circuit's statement that the public employer merely must "make *reasonably* sure" that the agency fees will not be used to subsidize ideological activities that are not germane to collective bargaining (*Hudson*, 743 F.2d at 1194 (emphasis

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[10] For the same reason, there is no conflict with *Cramer v. Matish*, Nos. 89-1885/2077, 1990 WL 169640 (6th Cir. 1990), *see* Pet. at 12, which in any event is an unpublished and therefore non-precedential decision. *Cf.* Sixth Circuit Rule 206(c) (published decisions are binding on subsequent panels).

added)), only underscores that it is not obligated to insure that the *details* of the union's plan or of the union's implementation of the plan are perfect.[11]

Fourth, there is no conflict with the Third Circuit's decision in *Hohe v. Casey*, 956 F.2d 399 (3rd Cir. 1992). Pet. at 13-14. Petitioners quote *Hohe* to the effect that the public employer "may be enjoined from imposing the fair share fees on nonmembers when it is determined that the exclusive representative has not complied with the constitutional requirements." Pet. at 14 (quoting *Hohe*, 956 F.2d at 411). The same is true under the Court of Appeals' decision. As we have shown above, where it is determined that the union has not complied with *Hudson*, it can be enjoined from accepting agency fees until it has complied with *Hudson* and, under Federal Rule of Civil Procedure 65(d), that injunction will be binding upon a public employer which receives actual notice thereof. *Hohe* did not decide whether the public employer must necessarily be a defendant to such a suit (which, in any event, it need not, *see Lugar*, 457 U.S. at 941-42), since the relevant discussion in *Hohe* arose in the context of the fee payers' challenge to the agency fee indemnification clause, rather than a motion for dismissal or summary judgment by the public employer. *See Hohe*, 956 F.2d at 411.[12]

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[11] Petitioners also cite the Seventh Circuit's discussion of the state action issue in *Hudson*. Pet. at 13. As they concede, however, that issue in *Hudson* revolved around whether the *union* could be considered a state actor—an issue not raised in the present case. *Id.* The statement in the Seventh Circuit's decision that "when a private entity such as a union acts in concert with a public agency to deprive people of the federal constitutional rights, it is liable under section 1983 *along with the agency*" (*id.*, emphasis in original; quoting *Hudson*, 743 F.2d at 1191), must be understood in the larger context of the case itself, in which the court found the *plan* itself to be invalid and not merely the details of the union's implementation of the plan.

[12] Petitioners also quote *Hohe* to the effect that "the employer and the union must have a constitutional procedure in place *before* deducting

Additionally, it is worth noting that *all* of the circuit court decisions relied upon by Petitioners were rendered not only prior to the Court of Appeals' decision, but also prior to the Ninth Circuit's 1997 decision in *Knight*, on which the more recent decision is based. *Knight* criticized the reasoning of several prior decisions, including *Tierney*, for misreading *Hudson* as imposing certain duties on the public employer which *Hudson* did not. *See Knight*, 131 F.3d at 817. This does not amount to a square conflict between the circuits, for the reasons discussed above. But, to the extent that there is some tension between the reasoning of *Knight* and that of some of the decisions relied upon by Petitioners, it is worth noting that Petitioners have not cited a single decision rendered after *Knight*, much less one considering and rejecting *Knight*'s reasoning. We submit that any tension between these decisions (much less any asserted "conflict") should not be the basis for intervention by this Court until such time (if ever) that it is more fully developed by subsequent circuit decisions that have had an opportunity to address *Knight*.

2. Finally, there is no conflict with this Court's decision in *Hudson*, which does not speak, expressly or impliedly, to the potential liability of a public employer for legal deficiencies in the union's annual agency fee notice.

In *Hudson*, this Court affirmed in part the Seventh Circuit's reversal of the district court's judgment, rendered after a bench trial, for the defendants upholding the agency fee

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[agency] fees," and that this requirement "means that if a court subsequently determines that the procedures are constitutionally inadequate, both the public employer and the [union] shall be accountable for the constitutional violation." Pet. at 14 (first substitution added, second substitution in original; quoting *Hohe*, 956 F.2d at 405-06, emphasis in original). Again, there is no conflict with the Court of Appeals' decision since such a plan was clearly in place at all relevant times, and the dispute was instead over the details of that plan or of the union's implementation of the plan.

procedure. *See Hudson*, 475 U.S. at 298-301; *Hudson*, 743 F.2d at 1190. This Court did not affirm any judgment of liability against the public employer, since there was no such judgment below. Rather, the Seventh Circuit, whose decision this Court affirmed in part, had reversed the judgment of the district court and remanded the case for further proceedings consistent with its opinion. *Hudson*, 743 F.2d at 1197.

Further, there is no indication in this Court's opinion that the public employer ever raised the issue before this Court that is implicated here—whether a public employer can incur liability for the deficiencies in the union's annual fee notice merely by the routine deduction of agency fees. Nor does the Court's opinion in *Hudson* decide that issue, either explicitly or implicitly. To be sure, as Petitioners point out, the Court did recite that the public employer accepted the union's calculation of the fair share fee, made the requested fee deductions, and did not provide fee payers with an explanation of the union's calculation or the agency fee procedures. *See* Pet. at 15 (quoting *Hudson*, 475 U.S. at 296). But the Court's observations on this point were merely set forth in its statement of the underlying facts of the case. The Court nowhere alluded to (much less relied on) these facts in its discussion, nor did it draw any conclusions from them.

In fact, there is virtually nothing in the Court's discussion that bears on the liability of the public employer at all, much less in the context within which that issue is raised here—the union's annual fee notice. The *Hudson* Court's discussion of government responsibility arose in the context of its separate discussion of the requirement of a reasonably prompt decision by an impartial decisionmaker as to challenges to the union's calculation of the agency fee (i.e., the agency fee arbitration), rather than in its discussion of the union's annual fee notice. *See Hudson*, 475 U.S. 307 & n.20. And, even as to its discussion of the agency fee arbitration, the *Hudson* court did not impose any liability upon the public employer. Rather,

the Court made clear that the *union* has the responsibility to provide such an expedited procedure, *if* the government *qua* government (not *qua* employer) *chooses* not to do so. *Id.* at n.20.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

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No. 01-1307

IN THE

Supreme Court of the United States

Dianne Foster; MARK ALBRECHT; RICHARD DiGIACOMO, and BARRY LEE PARKS,

Petitioners,

v.

LORRAINE GARCY, in her official capacity as Superintendent, Board of Education, Livermore Valley Joint School District; KIM LOGAN, Superintendent, Ukiah Unified School District; JOE COTO, Superintendent, East Side Union High School District; RUTH MCKENNA, in her official capacity, Superintendent, Board of Education, New Haven Unified School District.

Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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I. Rule 65(d) provides no solution to the paradoxical legal order which the panel's decision imposes.

Federal Rule of Civil Procedure 65(d) provides no escape from the reality that the panel decision effectively places public employers who enforce illegal agency fee demands beyond the reach of the federal judiciary.[1] Contrary to the Superintendents' argument, Rule 65(d) does not authorize federal courts to enjoin persons from engaging in conduct from which they have no legal duty to refrain.

It is true that Rule 65 permits an injunction against a party to reach conduct of a nonparty, if the nonparty has notice of the injunction and acts in "active concert or participation" with the enjoined party in committing the enjoined conduct. But Rule 65(d) reaches nonparties only if the nonparty breaches a preexisting legal duty: "Rule 65(d) . . . do[es] not impose any

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[1] Petitioners previously argued, Opposition Brief ("Opp."), p. 17, that because forced withholding eliminates the need for termination or any other form of government enforcement of the illegal agency fee demands, the panel's decision results in *de facto* immunity for public employers. The Superintendents dispute this contention, reasoning that because California Education Code § 45061 gives fee payers the option to pay agency fees directly to the union, rather than through payroll deduction, a union may need to request a public employer to take disciplinary action against a fee payer who elects to pay fees directly, but then fails to do so. But all relevant collective bargaining agreements contain a standard clause, permitted under California law, providing for automatic payroll withholding for those who resist illegal enforcement of the agency fee through revocation of their payroll withholding authorization. Thus, it remains the case that under the panel's decision the constitutional obligations set forth in *Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292 (1986) can never arise in practice.

liability which would not exist without [the Rule]." *United States v. Wilhelm Reich Found.*, 21 Fed. R. Serv. 341, 17 F.R.D. 96 (D. Me. 1954), *aff'd on opinion below sub nom. Baker v. United States*, 221 F.2d 957 (1st Cir. 1955). Thus an injunction against the union could operate against a school district under Rule 65(d) only if the school district's "active concert or participation" confers liability on it under 42 U.S.C. § 1983, a liability the Ninth Circuit erroneously denied.[2]

II. The Superintendents mischaracterize the panel's decision to obscure the circuit conflict.

The Superintendents argue that there is no circuit conflict because the contrary decisions from other circuits concern faulty plans, whereas this case concerns implementation details of an otherwise valid plan. Opp., pp. 12-15 n.4. This contention is false. The panel made no determination that the "plan" in this

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[2] The Superintendents argue that an injunction obtained against a union can be enforced against a school district under Rule 65(d) "because the employer undoubtedly acts in 'concert or participation' with the union in deducting the agency fee." (Opp., p. 5, citation omitted). Elsewhere, the Superintendents argue that they should be immune from liability because "in fulfilling its duties with regard to the notice, the union acts separately and independently of the employer." (*Id.*, p. 10). If the latter contention is true, then the former contention must be false. A lack of joint participation and concerted action would preclude enforcement of an injunction against the employer under Rule 65(d). *E.g.*, *Travelhost, Inc. v. Blanchard*, 68 F.3d 958, 962 (5th Cir. 1995) (injunction cannot operate against a nonparty unless the nonparty acts in concert with the party enjoined). Conversely, because the school districts act in concert with the union in enforcing the illegal agency fee demand, both the union and the school district are liable under Section 1983.

case was either adequate or operating. Nothing in the record would support that finding. The panel's decision is not limited to illegal "implementation details." The panel held that public employers had no duty under *Hudson* arising from the "routine collection" of the agency fee. This decision cannot be reconciled with *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), or decisions from the other circuits.[3]

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[3] A concise refutation of the Superintendents' present position as to the meaning of the panel's decision and whether it creates a circuit conflict is provided, in a different Ninth Circuit case, by none other than the Superintendents' counsel.

> *Foster* discussed the issue of a "plan" not in the context of imposing any such additional requirement, but rather discussing the meaning of a Sixth Circuit case, *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987). In that discussion, which arose in the course of the court's ***rejection*** of the fee payers' argument based upon *Tierney, Foster* confirmed that *Tierney* is ***not*** the law of this circuit.

Reply Brief for Superintendents on Cross-~~Appeal at 3~~, *Sheffield v. California Teachers Ass'n*, Nos. 01-15590, 01-15705 (9th Cir. 2001).

> The only test that *Foster* imposes for public employer liability is whether the employer has taken adverse action against a fee payer that is more serious than a non-consensual payroll deduction.

Id. at 7.

> The *Foster* Court confirmed that *Tierney* is not the law of this circuit. . . . At no point did the *Foster* Court impose any requirement relating to a "plan" with regard to public employer liability in agency fee cases.

Id. at 9.

The distinction the Superintendents advance to the validity of a plan versus implementation details is not recognized in any court decision. No legal theory based on this distinction was advanced by any party. Moreover, audited financial disclosure is required by *Hudson*. It is not an implementation detail.

Equally specious is the Superintendents' argument that the Third Circuit's decision in *Hohe v. Casey*, 956 F.2d 399 (3rd Cir. 1992), does not directly conflict with the panel's decision. The Third Circuit held that

> The public employer may be called upon *to defend* the deduction of the fees and may be *enjoined* from imposing the fair share fees on nonmembers when it is determined that the exclusive representative has not complied with the constitutional requirements [for their collection].

Id. at 411 (emphasis added).

The Superintendents maintain that what *Hohe* must have meant was that the injunction against the union would apply against the public employer pursuant to Rule 65(d) as a person acting in "active concert or participation" with the union. As previously stated, that argument makes no sense because Rule 65(d) cannot create liability where liability does not already exist apart from Rule 65(d). The Superintendents' argument is further undermined by the fact that *Hohe* also states that "[t]he public employer may be called upon to defend the deduction of the fees." The injunction against the employer contemplated by *Hohe* arises from the employer being a defendant in a law suit in which a *Hudson* violation is proved, not, as the Superintendents posit, as a consequence of being served with an injunction naming only the union and those who act in concert with it.

The Superintendents also contend that the Seventh Circuit's decision in *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1197 (7th Cir. 1984), does not conflict with the panel's decision. They argue that "the Seventh Circuit's statement that the public employer merely must 'make *reasonably* sure' that the agency fees will not be used to subsidize ideological activities that are not germane to collective bargaining only underscores that it is not obligated to ensure that the details of the union's plan or of the union's implementation of the plan are perfect." Opp., pp. 13-14 (citation and emphasis omitted). The argument is a *non sequitur*. The *Hudson* court said nothing to suggest that the constitutional obligations for the collection of agency fees are less exacting for the public employer than for the union. Such a proposition would be contrary to the *Hudson* court's reasoning, which was grounded in joint participation and state action theory, not in any difference in the legal duties owed to nonunion employees by the constitutional joint tortfeasors.[4]

Equally unsound is the Superintendents' argument that the Sixth Circuit's decisions in *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), and *Cramer v. Matish*, 1990 WL 169640 (6th Cir. 1990), present no conflict with the panel's decision simply because both cases concerned an indemnification clause in the collective bargaining agreement. That fact, though true, in no way vitiates the panel decision's conflict with the Sixth

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[4] *Hudson*, 743 F.2d at 1191; *accord Gilpin v. American Fed'n of State, County, & Mun. Employees*, 875 F.2d 1310, 1312 (7th Cir. 1989) ("The first amendment has been held to require the public employer and the union to establish efficacious procedures, including notice and right to a hearing, for determining how much of the union's proposed agency fee is proper") (citation omitted).

Circuit's holding that "both parties to a fair share agreement must be held accountable for their responsibility to see that *Hudson*'s commands are followed." *Weaver*, 970 F.2d at 1538.

For reasons that are unclear, the Superintendents argue that before resolving the conflict among the circuits, this court should await subsequent interpretations of an earlier Ninth Circuit case, *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807 (9th Cir. 1997). That two decisions from the same court are in conflict with decisions of the other circuits is no reason to deny *certiorari*. Moreover, the premise of the Superintendents' argument is false. *Knight* does not hold that employers have no legal duty to abstain from collecting agency fees where the constitutional preconditions have not been observed. All that *Knight* holds is that employers have no duty to inspect a *Hudson* notice *before* it is mailed to agency fee payers. 131 F.3d at 817. This only makes sense. Until the government acts to enforce the illegal agency fee requirement (by deducting fees or otherwise), there is no state action and no employer liability. That no court has rejected *Knight*'s reasoning proves nothing.[5]

III. The Superintendents' state action argument confuses the issue.

The Petitioners previously argued that because the unions are non-governmental actors, there is no intellectually tenable way to

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[5] The panel's decision was not *based* on *Knight*, as the Superintendents suggest. Opp., p. 15. *Knight* cites with approval the specific passage from *Tierney* which holds that government enforcement of the agency fee through involuntary withholding triggers the constitutional duty. *Knight*, 131 F.3d at 817 (citing *Tierney*, 824 F.2d at 1504). Rather, the panel made an effort to ameliorate the tension between its holding and the decision in *Knight*.

hold the unions, but not the school districts, liable for a constitutional violation arising out of joint participation in the enforcement of an agency fee agreement. In rebuttal, the Superintendents confuse the issue and argue that private actors can be sued under Section 1983 without the presence of a public entity as a defendant. (Opp., pp. 4 n.1, 10, 14.) No one disputes that where private and public entities act in concert to violate the Constitution, a Section 1983 claim can be maintained solely against one without joining the other as a defendant. This fact does nothing to cure the illogic by which the panel concluded that although unlawful government action occurred, the government nonetheless did nothing unlawful.

IV. The Superintendents confuse nonparticipation in illegal activity with interference in internal union matters.

The Superintendents mischaracterize the issue in this case as "whether . . . public employers [have] a legal duty to police the union's compliance with *Hudson*'s 'adequate explanation' requirement when they deduct agency fees from the fee payers' paychecks." (Opp., p. 8.) All that the Constitution requires of public employers is to abstain from enforcing the illegal agency fee requirement unless and until it can be done lawfully. If the school districts' forbearance from enforcement of an illegal agency fee demand constitutes "policing the union" or "interference in internal union matters" under the Superintendents' definition of those terms, this activity is necessary only because the school districts agreed to serve as the unions' collection agents. As governmental entities, they have a duty to ensure that ***their own*** activities do not violate their nonunion employees' constitutional rights. *Weaver*, 970 F.2d at 1538.

Contrary to the Superintendents' contention, the unions do not "act alone and in their own interests." They act in concert by prior agreement with the employer.[6] That agreement reflects reciprocal concessions calculated to advance both parties' interests, in this case without regard to the nonunion employees' constitutional rights as they relate to terms and conditions of employment. It cannot be the rule that a public employer is not responsible for unconstitutional terms and conditions of its employees' employment.

V. Under *Hudson*, public entities that assist labor unions in the illegal collection of agency fees are jointly liable.

The Superintendents dismiss the *Hudson* Court's language imposing employer responsibility[7] by suggesting that this Court's mandate applies only in the context of the neutral fact-finding, and not the notice. (Opp., pp. 16-17.) Even as to the fact-finding, the Superintendents maintain that the constitutional obligations imposed by *Hudson* apply only to those employers who voluntarily undertake to administer the neutral fact-finding procedure (which they are not obligated to do). As addressed

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[6] That a union can sue a school district to compel enforcement of a labor contract is a self-inflicted legal disability. Thus, it can provide no escape from the consequences of illegally taking the nonunion employees' money.

[7] *See* 475 U.S. at 307 n.20 ("the *government and union* have a responsibility to provide procedures that minimize th[e] impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights") (emphasis added).

more fully in the Petition (pp. 14-18), there is no language in *Hudson* that would support such a strained interpretation.

The Superintendents' argument that the teacher is better positioned to protect his or her rights against forced unionism than is the public employer is obviously wrong. Every federal court decision on point has reached the opposite conclusion.[8] It is unreasonable to force nonunion employees, each year, to incur the risks and costs of litigating a claim worth perhaps $50 on the hope that at the conclusion of the litigation they might recover their reasonable attorneys fees (which oftentimes exceeds $100,000). Moreover, even if the fee payer prevails, expert witness fees cannot be recovered.

The Superintendents pretend that they lack the competence and information to assess whether the union has complied with *Hudson*'s notice requirement. Therefore, they argue, fee payers should be expected to perform this task. But the fee payers have no greater competence and knowledge and, unlike the employer, have no bargaining power that would enable them to acquire necessary information, and no leverage by which to compel

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[8] *See, e.g.*, *Hudson*, 743 F.2d at 1192 ("most violations of the First Amendment caused by union-security clauses or union-shop clauses . . . would go unremedied–maybe even undetected–if the employer had no duty to establish workable procedures for protecting dissenters' rights"). Additional authority is discussed in the Petition, pp. 22-25.

The Superintendents argue that the panel decision is supported by California law (Opp., pp. 7-8). It is axiomatic that unlawful "state action" is endorsed by the state, either by statute or otherwise. However, the United States Constitution prevails over contrary state law and policy.

compliance. The Superintendents also argue that it would constitute an improper intrusion into internal union matters for them to ensure that the *Hudson* notice is adequate before taking fees from their employees. Yet the Superintendents concede that *Hudson* imposes on employers exactly that requirement (their feigned ignorance and incompetence notwithstanding), if the issue is discipline or discharge. In any event, a notice to nonmembers required by First Amendment due process is not an "internal union matter."

Contrary to the Superintendents' contention, very few feepayers can incur the economic risk of litigating individually small claims. Unions, therefore, incur little risk by refusing to discontinue illegal collections. The better solution is for the public officials to abstain from making the illegal collection. It is not unreasonable to expect public school officials to abstain from involvement in illegal activity.

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